UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NEEDHAM EXCAVATING, INC.

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO

Cases 25–CA–239166
25–CA–244670
25–CA–245763
25–CA–261188
25–RC–243735

Raifael Williams, Esq.,
for Acting General Counsel.

Stan Niew, Esq. and *Jeffrey Wright, Esq*.,
for the Respondent.

Elizabeth LaRose,
for Charging Party Union.

DECISION

SHARON LEVINSON STECKLER, ADMINISTRATIVE LAW JUDGE. This hearing was conducted via Zoom videoconferencing[1] on April 22–23, 26–27 and May 10, 2021. All parties were represented by counsel. The case consolidates unfair labor practice allegations and challenged ballots. Both International Union of Operating Engineers, Local 150, AFL–CIO (Union) and Needham Excavating, Inc. (Employer) have pending objections.

Based upon careful review of the transcripts, exhibits and briefs, as well as observation of the witnesses' demeanor,[2] I make the following

[1] The hearing faced some technical difficulties, which required the skillful intervention of the deputies. See, e.g., Tr. 366–370, 786–787. Their services are greatly appreciated.

[2] My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

FINDINGS OF FACT

JURISDICTION

The Employer admits, and I find, that it is a corporation, with an office and place of business in Walcott, Iowa (the Employer's office) and has been engaged in the business of construction and excavation. For the 12 months ending December 31, 2020, the Employer has purchased and received at its Walcott, Iowa office goods valued in excess of $50,000 directly from points outside the State of Iowa. The Employer additionally admits, and I find, that the following persons are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act: Joseph Needham, president (President Needham); Nick Needham, general manager (Manager Needham); Curt McKinley, superintendent (Superintendent McKinley).

The Employer admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5).

PROCEDURAL HISTORY

Charge 25–CA–239166 was filed by the Union on April 5, 2019 and served by regular mail on April 8, 2019. The first amended charge in Case 25–CA–239166 was filed on April 2, 2020 and served by regular mail on April 3, 2020. Charge 25–CA–244670 was filed July 11, 2019 and served by regular mail on the same date. The first amended charge in Case 25–CA–244670 was filed on July 30, 2019 and served by regular mail on July 31, 2019. The second amended charge in Case 25–CA–244670 was filed on April 2, 2020 and served by regular mail on April 3, 2020. The first amended charge in Case 25–CA–245763 was filed on April 2, 2020 and served by regular mail on April 3, 2020. The second amended charge in Case 25–CA–245763 was filed on May 7, 2020 and served by regular mail on May 8, 2020. Charge 25–CA–261188 was filed on June 3, 2020 and served by regular mail on June 3, 2020.

On June 21, 2019,[3] the Union filed a petition for an election with certain employees of Respondent. The July 5, 2019 Regional Director's Decision and Direction of Election identifies the stipulated unit as an appropriate unit:

> *Included*: All full-time and regular part-time heavy equipment operators employed by the Employer at its facility located at 137 North Main Street, Walcott, Iowa 52773;
>
> *Excluded*: All other employees, and office clerical employees, manager and guards and supervisors as defined in the Act.

(R. Exh. 17.)[4]

The election was held on July 12. The tally of ballots showed the following results:

[3] All dates are for year 2019 unless otherwise noted.

[4] The decision contains the following abbreviations: Tr. for Transcript; GC Exh. for General Counsel exhibit; R. Exh. for the Employer's exhibit; U Exh. for the Union's exhibit; GC Br. for General Counsel's brief; R. Br. for the Employer's brief; and U Br. for Union's brief. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case.

Approximate number of eligible votes	17
Number of void ballots	0
Number of votes cast for Petitioner/Union	3
Number of votes cast against participating labor organization	5
Number of valid votes counted	8
Number of challenged ballots	9
Number of valid votes plus challenged ballots	17

The challenges are determinative.

On May 13, 2020, the Region issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing for Cases 25–CA–244670, 25–CA–244670, and 25–CA–245763. On August 7, 2020, the Region issued another Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in which the complaint was further consolidated with Case 25–CA-261188. The Employer filed timely answers to the unfair labor practice complaints, denying all material allegations. On June 18, 2020, the Regional Director for Region 25 consolidated for hearing representation Case 25–RC–243735 with the unfair labor practice consolidated complaint in Cases 25–CA–239166, 25–CA–244679, 25–CA–245763 and 25–CA–261188.

The consolidated complaint makes the following 8(a)(1) allegations:

Respondent Employer, by Joseph Needham, by telephone:

On March 18, 2019, interrogated its employees, created an impression of surveillance of union activities and sympathies and threatened employees with discharge or other unspecified reprisals if employees continued their union and/or protected activities; and,

About March 29, 2019, threatened employees with discharge or other unspecified reprisals if they continued to engage in union or protected concerted activities.[5]

About April 11, 2019, Respondent Employer, by Joseph Needham, Nick Needham, and Curt McKinley, at Respondent's facility, by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they refrained from engaged in union activity.[6]

About April 19, 2019, Respondent Employer, by Nick Needham, in writing, prohibited employees from talking about the Union during working time while permitting employees to talk about other nonwork subjects, created an impression of surveillance of employees' union activities; and threatened employees with discipline if they engaged in union activities.[7]

[5] Complaint ¶5(b).
[6] Complaint ¶5(c).
[7] Complaint ¶5(d).

About May 29, 2019, Respondent Employer, by Joseph Needham, at one of Respondent's jobsites, threatened employees with discharge if they engaged in union activities.[8]

About June 10, 2019, Respondent Employer, by Curt McKinley, at Respondent's facility, created an impression among its employees that their union activities were under surveillance by Respondent.[9]

About March 31, 2020, Respondent Employer, by an unknown supervisor or agent, at Rock Island, Illinois placed a vehicle near an employee's home to engage in surveillance of employees to discover their union and protected concerted activities.[10]

The complaint also alleges that, about June 10, 2019, in violation of Section 8(a)(3), the Employer permanently laid off employee Brett Gripp due to his union activity. It further alleges that, about July 8, 2019, in violation of Section 8(a)(3) and (4), the Employer terminated Adam VanOpDorp for his union activity and for appearing and intending to testify in the representation case.

The Employer denied all substantive allegations. It also maintains 16 affirmative defenses, including that certain allegations were included in charges beyond the 6-month statute of limitations and that any possible violation was de minimis.

The representation case deals with determinative challenges and objections to the election from Respondent and the Union. The Union challenged the ballots of Bill Bouchard, Timothy Hamann, Kenny McAdoo, Clint McKinley, Rick Needham, Amber Nielsen and Jared Nielsen. The Employer challenged the ballots of alleged discriminatees Adam VanOpDorp (VanOpDorp) and Brett Gripp (Gripp).

Regarding the unfair labor practices, I find that the Employer violated Section 8(a)(1) by: Creating an impression of surveillance; threatening employees with discharge and discipline for union activities; interrogating employees about union activities and sympathies; telling employees that they could not talk about the union while permitting discussion of other topics during working and company time; and, solicited grievances and promised benefits for refraining from union activity. I also find that the Employer unlawfully terminated VanOpDorp and unlawfully laid off Gripp.

Summary of Findings: Unfair Labor Practices

I. NEEDHAM EXCAVATING AS THE EMPLOYER AND ITS OPERATIONS

Employer engages in excavating for residential and commercial properties. President Joseph Needham (President Needham) maintained that that, in 2015, the work changed from excavating and backfilling for plumbers to working as a prime contractor, which included laying pipe. (Tr. 72.) President Needham generally oversees the operations. He also holds 49 percent of the shares in Employer. (Tr. 36.) His son, Nick Needham (Manager Needham), is

[8] Complaint ¶5(e).
[9] Complaint ¶5(f).
[10] Complaint ¶5(g).

the office manager, a position he has held since the early 2010s. Since at least 2017, Manager Needham runs the day-to-day operations. (Tr. 43–44; 195.)

President Needham's youngest son, Daniel Needham,[11] works in the field and performs "critical" work. (Tr. 48–49.) Daniel Needham is a member of management and a project manager. (Tr. 836.) Daniel Needham hires and fires employees. (Tr. 812.)[12] Some employees also identify Daniel Needham as someone in management who can resolve issues. Also employed in the organization is President Needham's brother, Richard Needham (Rick Needham), who primarily is a truck driver.[13]

Curt McKinley, who President Needham identified as like a son to him and best friends with his youngest son, runs field operations as the Superintendent,[14] a position he has held since fall 2018. His duties include ordering material for jobs and reviewing timecards for completeness and correctness. He began reviewing timecards in December 2018. (Tr. 345.) He previous operated equipment and performed labor. (Tr. 330–331.) The project manager sets up the day-to-day operations, including obtaining material, scheduling trucks and personnel. (Tr. 44–45.) Superintendent McKinley's sister was married previously to Manager Needham.

President Needham estimates Employer employs about 25 to 35 employees (Tr. 37.) Between January 1, 2017 and July 8, 2019, Manager Needham estimated the Employer employed between 30 and 33 employees. (Tr. 194.) President Needham testified that all employees work in all job classifications, including laborers, operators, and drivers. President Needham testified that the operators, who are "lead guys," make more money but operators have commercial drivers' licenses and can do everything, including operating scrapers, backhoes, rollers and dump trucks. They are paid the same rate each day, regardless of what job they perform. (Tr. 38–29.) In contrast, Manager Needham clarified that some employees work primarily in specific areas: approximately 5 to 8 work as laborers, with 3 to 4 qualified as pipe setters; 11 or 12 work as heavy equipment operators; and 4 to 5 work as drivers. (Tr. 194–195.) Demolition work involves heavy equipment, such as an excavator, to tear down structures. (Tr. 321.) The Employer does not include the clean-up as actual demolition, but a machine sometimes loads the debris onto a truck for hauling away during the clean-up phase of the demolition project. (Tr. 326-328.)

The operators use excavators, bulldozers, dirt scrapers, mini-excavators, skid loaders and bobcats. The operator digs a pit and grades the area. The excavator was used to dig a ditch, install pipe and if needed, tear out concrete. (Tr. 434.) The laborer instructs operators on how much to dig out of trenches, where to dig and at what grade. The laborer uses a pipe laser or ratary laser, or a GPS to assist in determining where to dig. (Tr. 1037–1038.) Two laborers, or pipesetters, work in tandem, with one in the graded pit as a pipe setter and one on the ground. The laborer on the ground connects pipe and then the operators set the pipe in the pit.

[11] Daniel Needham is sometimes referred to as "Boo." (Tr. 101.)
[12] Based upon Daniel Needham's admissions of supervisory indicia, I find that he is a supervisor within the meaning of Sec. 2(11) of the Act.
[13] President Needham's great-niece, Zoe Ogden, has also worked intermittently for the Employer driving a truck. (Tr. 96.) Other relatives have worked for the Employer: his brother John Francis Needham and brother-in-law Eldon Hagen.
[14] Curt McKinley identified his job title as manager. (Tr. 330.)

The pipesetter aligns the pipe, which is then pushed together. (Tr. 40–41.)[15] The bulldozer is used for grading or smoothing a site. Skidloaders are used for smaller projects and clean-up on job, particularly in tight spaces. (Tr. 434–435.) The scrapers are used on large projects when direct must be hauled and placed. (Tr. 435.) Operators do not need commercial drivers' licenses to use this equipment, although operators Aaron Hamilton and Brandon McKay held these licenses. (Tr. 435–436.)

The Employer operates four tandem dump trucks and three semi combinations. For the semis, the Employer had several attachments---the lowboy or tub. The tub is a short dump truck used to haul concrete, rocks or lime screenings. The lowboy hauled heavy equipment. (Tr. 555.) The truckdriver may drive a "lowboy tractor" to a dump truck or a semi with a tub trailer. The drivers load the trucks themselves. The loads may be black dirt if the hauling takes two or less loads, or if it is a bigger job, such as at a quarry, a machine operator will fill the truck. (Tr. 41.) The dump truck drivers usually hauled rock in and out of the quarries or drop off gravel or dirt on worksites. They spent approximately 30 minutes at a time at the worksite. (Tr. 438.)

The Employer provides the employees' daily assignment through a telephone app called ScheduleBase. It provides scheduling for laborers as well as operators. Before April 11, 2019, the employees could see each other's schedules. However, by April 12, 2019, ScheduleBase was changed so that only the affected employee could see his appropriate schedule. (Tr. 432–433; U Exh. 27.)

President Needham testified that Employer has unwritten work rules. It has no progressive disciplinary system and gives no written disciplinary action. (Tr. 46.) When asked by the Employer what those rules are, President Needham testified to talking on a cell phone, smoking inside of a piece of equipment to which one is not permanently assigned, and greasing and fueling equipment each day. Greasing and fueling equipment is supposed take place "10 hours for the next day." (Tr. 184.) He also volunteered warming up machines when starting them and cooling them off at shutdown. (Tr. 183–184.)

President Needham maintained that he had the last say on suspensions in 2019 but shifted about whether he did: "They hire and fire guys without me knowing about it." The record reflects that the Employer terminated two employees: A driver who came to work inebriated; and a laborer who was a no show and never came back.

The Union represented the Employer's employees through the Building Trades Agreement and Heavy and Highway Agreement from 1992 until 2017. (Tr. 49–50.) The heavy equipment operators were the only employees represented by the Union until the Union was decertified in 2017. President Needham gave the employees prepared letters for their resignation from the Union. (Tr. 168–169.)

II. UNIONIZATION EFFORTS AND THE EMPLOYER'S EARLY RESPONSE IN 2019

About March 5, 2019, heavy equipment operators Adam VanOpDorp and Jake Madden, disillusioned with some of the Employer's promises during the course of decertification, signed authorization cards and gave them to Union Organizer Shannon Vickers. VanOpDorp then began asking other employees if they were interested in signing authorization cards or renewing their union representation. (Tr. 363.)

[15] Needham then changed his answer to say it was the lead person who set the pipe by laser. (Tr. 41.)

A. On March 18 President Needham Calls VanOpDorp on His Cell Phone While VanOpDorp is at a WorksIte

In about March 2019, Manager Needham heard a rumor that the Union was calling the employees. (Tr. 196.) On March 18, 2019, about mid-morning, President Needham telephoned VanOpDorp while he was working at a jobsite in Davenport, Iowa. VanOpDorp recorded the conversation. President Needham did not ask whether VanOpDorp was operating equipment through most of the conversation and never suggested that he get off the phone. (Tr. 490.)

President Needham asked how everything had been going since the decertification. VanOpDorp talked about personality clashes between the laborers and the operators. President Needham blamed the laborers and said, "The bitchin' needs to stop and if there's a fucking problem, then we need to fucking talk the problem through before everybody gets pissed." President Needham asked if VanOpDorp heard bitching from other employees. VanOpDorp denied that he heard anything. President Needham said the 401(k) made quite a bit of money in 2018. (Tr. 378.) During the conversation President Needham asked if there were regrets about going nonunion or if it was the laborers. (Tr. 379.) President Needham talked about the offers made for a Laborers contract and the pension for potentially that contract. President Needham said the Employer owed the Union $340,000 and he did not want "to get into that fucking boat again." President Needham talked for a while about the performance of the 401(k) and the health insurance. President Needham said that he heard Ryan Drew, a business agent for the Union, contacted some of the employees to rejoin and asked if VanOpDorp had been contacted. President Needham discussed Daniel Needham (aka Boo) as an operator, then reverted to hearing too much complaining. President Needham said, ". . . [T]hat bitching gotta stop. If you don't fucking like it here, then get the fuck out. . . . If you think you can get a better deal somewhere else, I don't fucking blame ya." President Needham concluded that he was checking to make sure everyone's opinions were matching and make sure VanOpDorp's opinion was the same as everyone else. He then said he heard that the Union was trying to get another vote, which he did not think the Union would win, but "who knows. . . ." VanOpDorp volunteered that if he heard anything he would let President Needham know. (GC Exhs. 3 and 4.)

B. The March 29 Conversations with VanOpDorp

On about March 29, Superintendent McKinley notified Manager Needham that he and and Adam VanOpDorp had a verbal disagreement at a truck stop near the office. VanOpDorp complained about some issues, including the health insurance the Employer provided after the Union was decertified. (Tr. 407.) Superintendent McKinley also told Manager Needham that employee Jake Madden also had similar concerns. (Tr. 197.) Manager Needham brought up with VanOpDorp a few issues, such as comments about getting rid of the entire crew that did the 18th Street project and that he was upset that he was included plus the health insurance issues that were subsequently raised the next month. VanOpDorp also complained about communications within the company and identifying expectations for each day. (Tr. 311–312.)

Later that day, President Needham called VanOpDorp, who again voiced the same concerns. President Needham told VanOpDorp to start thinking for himself and to shut up and go back to work. Further, "If you want to get back to the Union, I can make a call to Marshall Douglas if that's what you want." (Tr. 407.)[16]

[16] After VanOpDorp's termination, the Employer created a list of problems with VanOpDorp's

On April 5, 2019, the Union filed charge 25–CA–239166, alleging that on March 18 President Needham unlawfully interrogated VanOpDorp, gave the impression of surveillance and conditioned further employment on not participating in union activities and not discussing terms and conditions of employment. (GC Exh. 1(a).) The charge was mailed to the Employer on April 8. (GC Exh. 1(b).) On April 10, 2019, VanOpDorp placed a large union sticker on his back window of the truck he drove to the employer's facility or jobsites. (Tr. 409–410;GC Exh. 7.)

C. On April 11 Management Meets with Three Operators in the Office

On April 11 the Employer's managers held a meeting with heavy equipment operators VanOpDorp, Tracy Marshall and Aaron Hamilton. (Tr. 397.) Marshall showed up approximately 15 minutes into the meeting. The meeting lasted approximately 80 minutes. Present at the meeting for management were President Needham, Manager Needham, and Superintendent McKinley. Daniel Needham testified he was present. (Tr. 851.) VanOpDorp recorded the meeting.

VanOpDorp walked into a meeting wearing a shirt with the Union's logo on it. (Tr. 51, 852.) President Needham asked VanOpDorp if he had a sign on his shirt and whether he was leaving. President Needham and Manager Needham asked what the issue was. President Needham said, "We gotta get to the bottom of what the fuck's going on." VanOpDorp said he had said what he wanted to say previously. President Needham then informed the operators that one had quit the previous day.

President Needham repeated that he wanted to know what the problem was. VanOpDorp said he had been lied to about a "financial core deal" and "if something went down, I could go back to the union." As the discussion progressed, President Needham said he never intentionally liked and that he speaks his mind. He then stated, "We've never lied to you. Whatever we got bad information or the fucking NLRB won't follow the federal law. What are we supposed to do about that? How can we do that?" (GC Exh. 6 at 4.)

As the discussion progressed, President Needham said "we gotta fix it" if something was wrong. VanOpDorp raised pay. President Needham said, "You can't go to the union and see the fucking money you're making now." VanOpDorp disagreed.

Later VanOpDorp complained about scheduling. President Needham offered to allow him to sit with the other managers each night to make the schedule. President Needham, at about 26 minutes into the recording, again asked what the Employer had to do to go forward. (GC Exh.6 at 13.) Marshall mentioned how overtime might cut into the Employer's profits. (GC Exh. 6 at 14.) President Needham provided an example of not being able to "move dirt" until the second week of April that year and Manager Needham confirmed the rain problems. President Needham later said the Employer was a month behind on another project. Marshall suggested that meeting once a month would be good to keep everyone apprised of events with the Employer. (GC Exh. 6 at 15.) President Needham said he was not opposed to meeting for breakfast. He later said that if someone needed a meeting, he said he would be there to sit

performance. (R. Exh. 15.) The entry for these conversations is listed as April 1. It also fails to include that President Needham called VanOpDorp after Superintendent McKinley and Manager Needham talked with VanOpDorp. Because this exhibit was created after VanOpDorp's termination, I find this self-serving entry of little value.

down and talk. President Needham then asked VanOpDorp if he was ever going to be happy again. (GC Exh. 16.) VanOpDorp said he did not know. President Needham said to VanOpDorp, "[W]e don't you to leave, you've been here for a long time. But if that's what you want to do then that's what I want you to do. . . . I'd rather work through this." (GC Exh. 6 at 17.)

The employees complained that the Employer had not fulfilled promises made after decertification in 2017. In particular the employees raised was the Employer's promise to provide health insurance equivalent to the insurance provided through the Union with 100 percent of the premiums paid by Employer as part of the decertification. (Tr. 53–55, 198.; GC Exh. 6 at 18.) The managers said their health benefits would be as good or better than the Union's but actually was nothing close to the Union's. President Needham asked the other employees what they thought about the health insurance and those employees said it was as good or better than the Union's. (Tr. 399.) The operators had health insurance with the Union after decertification until their credits ran out. President Needham said that the operators would get payment for the insurance. Marshall also recalled that the Employer promised the insurance would be as good or better without the Union. (GC Exh. 6 at 23.) President Needham said he would pay VanOpDorp what he had to pay out of pocket. (Id. at 24.)

Towards the end of the meeting, the other operators were discussed. President Needham talked about cleaning up after a worker and told the employees attending the meeting that they needed to "be on the production piece." Manager Needham followed up: "We know who can get production, who we stick, you know. . . . [W]hen you look at the schedule and say hey, we gotta be at 5 jobs tomorrow, we got 4 guys we can trust. Who we putting on this fifth job. . . . Which may very well men, you guys are getting stuck with the lower guys, which we know means you're gonna get less done but that 5th job is still getting something done . . . . " (GC Exh. 6 at 41; R. Exh. 21.)

III. THE EMPLOYER LAYS OFF BRETT GRIPP

Brett Gripp worked for Employer from fall 2018 until he was laid off about June 10, 2019. (Tr. 200.) The superintendent who preceded McKinley hired Gripp. At the time of his layoff Gripp's supervisor was Superintendent McKinley. (Tr. 538.)

Whether Gripp was only a truckdriver or operated heavy equipment with regularity is disputed. The Employer contends that he was primarily a truckdriver. He was hired as a Gripp was hired as a full-time dump truck driver at a time when the Employer allegedly had only part-time truckdrivers. (Tr. 61–63, 200–201, 334.) President Needham maintains that Gripp primarily drove dump trucks, which would be reflected on timecards or receipts for each day. Gripp held a Class A commercial driver's license, with hazmat and tanker endorsements, which was required for driving a semi-tractor trailer over 16,000 pounds combined. (Tr. 554.)[17]

Gripp testified that he operated all types of trucking vehicles owned by the Employer. (Tr. 556.) Gripp testified that he primarily was to drive dump trucks, 18-wheel semi-trucks with a lowboy and operate machinery when needed. Although the personnel records show Gripp was hired as a driver only, Manager Needham said that he was to work as a "universal employee." (Tr. 202.) Manager Needham testified that Gripp claimed, at hire, he could perform duties "better than anybody." (Tr. 200.)

[17] Other employees who held commercial drivers' licenses were Clint McKinley; Amber Nielsen, Curt Stange, Jimmy Jones, Rick Needham and Brandon McKay. (Tr. 554.)

About March 2019, Gripp and VanOpDorp had several discussions about unionization. Gripp also spoke with other employees about unionization. VanOpDorp told Gripp that he spoke with Shannon Vickers, a union organizer. (Tr. 538–539.) VanOpDorp also encouraged Gripp to talk with Vickers, which occurred likely in late March. Gripp signed a card on April 12, 2019. Gripp also talked with other employees about organizing to David Carter, another employee, during lunches. Gripp also testified that he wore union t-shirts and placed a union sticker on his vehicle.

Beginning late March Gripp kept notes about work. The May 10 entry states that Brandon McKay told Gripp that he was not suppose to tell Gripp about what he was doing because Gripp would tell the Union. No further explanation was given. His entry for May 13 states at 4:30 p.m. "Clint McKinley cocked off to me about Local #150." On May 14, the entry states he was not invited to lunch and "Clint won't speak to me." The May 28 entry states that President Needham "called all his employees a bunch of cunts." The May 29 entry, in relevant part, states that President Needham threatened to fire VanOpDorp, threatened whoever else is telling the Union "stuff," and that he had 20 people on the payroll that the Union knew nothing about. (U Exh. 76.) Gripp further testified that, about noon May 29, Gripp went to an Employer office to pick up his lunch pail. President Needham came around a corner and said to Gripp, "I'll tell you what, I got 20 guys on the payroll that [the Union] knows nothing about. If I find out who is feeding [the Union] information, they're done." No one else was present. (Tr. 542–543.)

A. The Employer Lays Off Gripp on June 10

About April or May, with a more specific date unknown to President Needham, Gripp turned a check back to the Employer for overpayment and told President Needham, "I don't want to steal any of your trapshooting money." President Needham testified that he found this to be the straw that broke the camel's back and claimed he then told the other managers to "get rid of him as soon as we can." Gripp did not recall this incident and denied that he ever told President Needham that he did not want to take trapshooting money. (Tr. 592–593.) President Needham never warned him about his remarks, which he characterized as occurring all the time, including for the previous 20 years in social settings.

President Needham, who testified that he made the final decision, decided to lay off Gripp instead of terminating him because they had "mutual friends." (Tr. 70.) Daniel Needham testified that he, Superintendent McKinley and Manager Needham conferred about terminating Gripp and they agreed to terminate Gripp. He did not mention President Needham conferring with him.

President Needham stated that the main reason Gripp was laid off was because "he has got a mouth on him that don't quit. . . . When the boys hired him, I told them that that was a very, very bad decision . . . . He has always got shit to say about something, and the decision to get rid of him was made in April or May." (Tr. 64.) Daniel Needham testified Gripp was mouthy, bragging about his abilities to do the job, and the "mouthy" comments began on his first day on the job, which led to his termination. (Tr. 844.) When Daniel Needham was questioned further about Gripp's abilities on the job, he admitted he was not present and could not give a date when it started. (Tr. 845–846.) Gripp was not disciplined. (Tr. 846.)

On June 10, the Employer permanently laid off Gripp.[18] At 6:30 a.m. that day, Gripp and Superintendent McKinley were working with the lowboy to load pipe. Gripp testified that he noticed that Superintendent McKinley, normally cordial, seemed on edge. McKinley said, under his breath, "Cat's out of the bag, Dude. I know you've been talking to 150." Gripp said, "Whatever, Curt," and continued to work. No one else was present. (Tr. 543–544.) At about 1:30 p.m., Superintendent McKinley texted Gripp to report to the office. (Tr. 544.) After Gripp finished with his work for the day, he went to the office and met with Casie Morehead, the secretary, and Superintendent McKinley. McKinley told Gripp that he was being laid off due to lack of work. Gripp pointed out that the Employer was busy. McKinley said Gripp did not know what was going on. Gripp rattled off some projects and McKinley said Gripp did not understand. During the conversation, Gripp asked if his layoff had anything to do with VanOpDorp and the Union. McKinley said he did not know what Gripp had going on with VanOpDorp. Gripp said he did not have anything going on with VanOpDorp and McKinley asked why he brought it up. McKinley denied that anything had to do with the Union. Gripp said that he could run anything and do everything and that there was plenty to do. McKinley said there was not plenty to do and said there was no truck work. (Tr. 546–547; GC Exhs. 9 and 10.) Nothing in this conversation referenced Gripp's conversation that morning with McKinley. (Tr. 579.) Nor did this conversation provide any other reason for the layoff.

On June 14, Gripp picked up his final paycheck in Manager Needham's office. Gripp asked to be called if the Employer got busier and Manager Needham said, "Will do." (Tr. 548.) In August, after the election, the Employer hired a new truckdriver. The Employer never called Gripp back to work.

B. The Employer's Reasons for Gripp's Layoff Start on Day 1 of Employment

Daniel Needham testified that Gripp had "shortcomings" early in his employment. (Tr. 857.) Superintendent McKinley testified that Gripp was limited to working as a dump truck driver and at the end of the wet spring season, no longer needed him, so he was the first to be laid off. (Tr. 334.) Gripp was the only employee to be laid off in that time period and the Employer has since hired two truckdrivers, one for the lowboy and a "shop girl" who could also drive dump trucks. (Tr. 334–335.) President Needham could not recall laying off any dump truck drivers before Gripp, but hedged that, in that time frame not all were full time except for Clint McKinley who drove a lowboy driver and later operating and running field equipment instead of driving. (Tr. 71.) During the Employer's cross-examination (after lunch), President Needham testified that the other managers were not happy with Gripp because he allegedly misrepresented that he could operate all equipment and other employees had to start equipment. (Tr. 187.) President Needham did not know whether Gripp was disciplined because he could not run different equipment. (Tr. 190.) On redirect, Gripp testified that he was never disciplined for work performance issues or damaging equipment. (Tr. 594.)

Manager Needham contended that employee Tracey Marshall began to complain about Gripp's interrupting work by getting out of the truck within a few weeks of hire, approximately the end of October or beginning of November 2019. (Tr. 203.) Manager Needham shared the

[18] The Employer's answer states its reasons for laying off Grippare: little work available for his limited skillset; unable to perform his duties of a truck driver in that he did not have the ability to remove equipment from or replace equipment on a lowboy; secure the equipment; he was a reckless driver; he was unable to operate a truck called a "tub"; he was unable to perform duties assigned to other employees complained that he impeded the progress of their work.

information with Superintendent McKinley and "believed" McKinley spoke with Gripp. (Tr. 203.) Marshall, who rarely worked with other operators, testified that he thought Gripp acted unsure about what he was doing and asked for assistance with loading a roller onto a truck. Marshall assisted on "a couple of occasions" because he had the time and told Superintendent McKinley about it once. (Tr. 652, 660–661.) However, Marshall could not identify when these incidents took place. (Tr. 658, 661.)

Manager Needham further testified that Chad Havill also complained about Gripp interrupting work in spring 2019; there Manager Needham told Havill to tell Gripp to get back in the truck and call him with further issues. (Tr. 204.) Manager Needham did not discuss the matter with Gripp. (Tr. 204.) Daniel Needham also testified that he heard from a laborer that Gripp, in fall 2018, made an uncomplimentary remark about the laborer's wife. No one in management apparently spoke to Gripp about the remark. (Tr. 833–834.) Superintendent McKinley testified that Gripp made a snide comment to another employee but did not establish when that occurred. (Tr. 892.)

Daniel Needham testified that Gripp was unable to operate certain pieces of equipment, such as the loader to move it off a trailer. However, he was unable to state where or when it occurred. Then Daniel Needham said that the problem started when Gripp was attempting to run a tub truck, and Amber Nielsen showed Gripp how to do so; however, Needham thought he heard about it from Manager Needham or Superintendent McKinley. Gripp did not receive any discipline for it. (Tr. 845–846.) Gripp denied that he need help on more than a couple of occasions to start machines. He specifically denied that Superintendent McKinley assisted him in starting a roller, but instead VanOpDorp assisted him. (Tr. 587.)

Regarding the instance in June 2019 when Superintendent McKinley assisted Gripp with loading pipe onto the lowboy, Gripp testified that he had assistance with unloading the pipe at the site of delivery, which was normal as the person would unload it with a machine. (Tr. 587.) Gripp agreed that other employees helped him load and unload equipment from the lowboy or take a backhoe off the lowboy trailer. (Tr. 587–588.) However, he denied that Macumber assisted him with starting up equipment or that Tracy Marshall assisted him with unloading machines. (Tr. 588.) He further testified that Clint McKinley showed him once how to start a piece of equipment. (Tr. 589.) Regarding unloading equipment Gripp testified employees always helped each other. (Tr. 589.) He denied that Amber Nielsen had to teach him to drive the tub. (Tr. 590.) He denied that he had a reputation for driving unsafely or too fast. (Tr. 591–592 He did not recall hitting a pothole in the Employer's truck and cracking the steering. (Tr. 592.)

Ian Macumber, who initially testified that he assisted Gripp on tying down a roller, admitted that he only assisted VanOpDorp once and could not recall whether he so informed management. (Tr. 684.)

Amber Nielsen testified that the speeding incident occurred in later summer or early fall of 2018. She changed regarding which management official she told about the incident: She then testified she was "pretty sure" and then positive that she told Superintendent McKinley. She testified that she told Gripp to slow down after he drove too fast through a school zone. She "believed" she told someone about it "probably . . . later that day." She was tentative and admitted that she did not remember. (Tr. 713.) Gripp denied that Amber Nielsen stopped him in his truck when she saw him speeding through a school one on a project in Moline. (Tr. 592.)

Tracey Marshall, an operator, testified to a leading question that Gripp was a "hot dog" driver. (Tr. 750–751.) Mechanic Bill Bouchard also testified that he occasionally saw Gripp driving and he was fast but never reported it to management. (Tr. 795, 797–798.) Daniel Needham also testified that he warned Gripp during spring 2019 that Gripp, while driving a semi, was speeding at the 3M project and that Gripp should slow down. (Tr. 831.) Brandon McKay denied that he ever saw Gripp drive too fast or unsafely. (Tr. 735.) Gripp further denied that Manager Needham told him to slow down. (Tr. 592.)

To another set of leading questions, Marshall testified that he heard from a mechanic that Gripp hit a pothole and cracked a steering mechanism on a truck. (Tr. 752.)[19] Marshall also testified that Gripp needed help to unload equipment, which appeared to be one incident and did not report that incident to management. (Tr. 758–759.)

McKay also testified that he once assisted Gripp with loading an excavator onto a truck and needed help to apply the chains to it as Gripp did not know which chains needed to be on the excavator. McKay reported this incident to Superintendent McKinley but could not recall when he reported it. (Tr. 736.) McKay could not recall any other incidents where he helped Gripp or any other person. (Tr. 736–737.)

IV. THE UNION FILES A PETITION TO REPRESENT THE EMPLOYER'S OPERATORS

On June 21, 2019, the Union filed Petition 25–RC–-243735 to represent the following unit:

> Included: All full-time heavy equipment operators.
> Excluded: Other classifications, supervisors, managers, office clericals and guards.

(GC Exh. 2.)

On July 2, 2019, the Board conducted a preelection hearing in Peoria, Illinois. President Needham and its attorney attended. The Employer also brought to the hearing Amber Nielsen and McKay, who were paid for their time to attend. VanOpDorp, Gripp, and Spencer Werthman also attended the preelection hearing on behalf of the Union. (Tr. 60, 186.)

VanOpDorp was subpoenaed for the hearing. (Tr. 420.) VanOpDorp was supposed to testify but apparently did not. VanOpDorp recorded no time on his timecard for that date. He saw President Needham and Employer Counsel Niew at the hearing. VanOpDorp's timecard reflects no hours worked on July 2. None of the Employer's witnesses denied seeing VanOpDorp at the hearing.

[19] First, Marshall testified that he heard the information about the cracked steering mechanism and pothole from a mechanic, then he testified he told the bosses about it after Gripp told him he was broke down and unable to come back to the job, which slowed completion of the project. These events supposedly occurred in fall 2018. Marshall then did not know whether Gripp was disciplined for it. (Tr. 752–754.) Given the shifts in the testimony, I do not credit it.

V. THE EMPLOYER TERMINATES OPERATOR ADAM VANOPDORP ON JULY 8, 2019

On July 8 the Employer discharged VanOpDorp, a heavy equipment operator. President Needham stated VanOpDorp was terminated because he was incompetent on running work and costing money on mistakes for two projects in Moline, Illinois: 18th Street in 2018; and 11th Street. He then added VanOpDorp lied about his timecard. (Tr. 74.) Superintendent McKinley testified that two issues caused VanOpDorp's termination: the 11th Street project, which required reworking, and falsifying his timecard. (Tr. 336.)

VanOpDorp was a heavy equipment operator for his entire employment period. After 2015, VanOpDorp dug pipe. In 2017, President Needham maintained that VanOpDorp was one of his "two best guys." (Tr. 877; U Exh. 87.) President Needham contends that VanOpDorp became the boss of a union labor crew, including checking grade after a union laborer, Jeremy Shoemaker, left the Employer's employ, perhaps during the summer of 2018. (Tr. 73.) In contrast, Daniel Needham testified that, since 2016, VanOpDorp was supposed to be the foreman and/or lead man on the job where he operated heavy equipment. (Tr. 854–855.) VanOpDorp testified he was a "co-lead" with the laborer, who worked in the ditches and set the grade for pipes.

A. On April 19 the Employer Emails VanOpDorp about Performing Union Business

On April 19, 2019, Manager Needham emailed VanOpDorp, and copying the other managers, about performing "union business":

> We are certain that you know that you cannot do union business on Company time while you are to be working.
>
> We have information that you were conducting union business during work time on Tuesday, April 16, 2019.
>
> While we will not impose discipline at this time, be aware you may be disciplined in the future if you continue to do union business during your working time.
>
> Limit union business to authorized breaks, lunch as well as before or after working hours

(Tr. 922; GC Exh. 8(a); R. Exh. 5.)

Around June 2019, employee Chad Havill, another heavy equipment operator, allegedly told Manager Needham that VanOpDorp spent about 1-3/4 hours of worktime speaking with a former employee, Nolan Moore. Havill denied observing this conversation. (Tr. 518.)

B. Alleged Issues with VanOpDorp's July 1 Timecard Entries

On July 1, 2019, VanOpDorp was working on a project with Chad Havill and a laborer, Joe Neal, and a certified plumber to install sewer mains and laterals in Davenport, Iowa. (Tr. 413–414, 505.) VanOpDorp testified that he arrived about 6:20 a.m. and Havill arrived at 6:30 a.m. Havill agreed that he arrived at 6:30 a.m. and VanOpDorp and Sam were already at the site. (Tr. 505.) VanOpDorp testified that he showed up at the jobsite early to set up GPS and

electronics for the layout of the project, which created minimal noise in an area. (Tr. 448; 506–Havill corroborates.)[20] Havill testified that the employees reported to work usually between 6:30 to 7:30 a.m., depending on the conditions. (Tr. 512.) The project was to install sewers and backfill.[21] VanOpDorp testified that he worked 10 hours. VanOpDorp testified that he left about 4:40 or 4:45 p.m. (Tr. 414–415.) For that day, VanOpDorp's timecard listed that he worked 8 regular hours and 2 hours overtime. (Tr. 415–416; GC Exh. 11.)

At about 4:30 p.m., Havill left and went to the Employer's facility in Walcott. VanOpDorp remained at the worksite when Havill left. (Tr. 451, 505, 1029–1030.) Havill testified that he reached the Employer's facility in at most, 20 minutes, approximately 4:50 p.m. (Tr. 1031.) He could not recall a specific conversation with Manager Needham or Superintendent McKinley about VanOpDorp's work. (Tr. 508–509.) He categorically denied telling anyone in management that VanOpDorp left the jobsite early. (Tr. 1031–1032.)

President Needham testified, to primarily leading questions on direct examination, that on July 1 at approximately 3:45 p.m. Havill came to the office for supplies. President Needham testified that he asked whether everyone left the jobsite early, and specifically asked about VanOpDorp. Havill supposedly said VanOpDorp left "too early," at 3:30 p.m. (Tr. 861.) Later President Needham testified that he was not sure that this conversation took place on July 1 but on or about July 1. (Tr. 872.) President Needham did not know whether anyone else was present. (Tr. 874.)[22] Superintendent McKinley testified that he saw Havill at 3:30 p.m. in the shop and later testified that Havill was in the shop at 4 p.m. (Tr. 900.) Manager Needham testified that he heard Havill talking with Superintendent McKinley at about 4 p.m. and went to the office, where Havill told Superintendent McKinley and him, and perhaps President Needham, that he and VanOpDorp left the worksite around 3:30 p.m. (Tr. 938, 978.) He later testified that he was 45 feet away from Superintendent McKinley and Havill while they talked. (Tr. 977.)

However, on July 8, President Needham called Havill and asked what time VanOpDorp left on July 1; Havill testified that he told him he did not know what time VanOpDorp left but VanOpDorp was still at the jobsite when he left. (Tr. 1032–-1033.) Havill asked why President Needham asked that question and President Needham replied that he had a plan but "couldn't reveal his cards." (Tr. 509, 1033.) President Needham testified that he called or texted Havill on July 8 about VanOpDorp leaving on July 1. He did not have the texts because his phone had crashed. President Needham testified that Havill's text confirmed VanOpDorp left on July 1 at 3:30 p.m. (Tr. 861, 874.)

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[20] The Employer questioned whether setting up early violated construction hours in a residential zone. (Tr. 449.) The Employer did not demonstrate whether the construction hours were limited to the use of heavy equipment or a decibel requirement. The Employer therefore failed to demonstrate whether construction hour restrictions could be a valid concern in determining at what time VanOpDorp started his day.

[21] Havill testified that the laborer was responsible for setting up the laser, operating the "story pole and ensuring that the proper grade was achieved while the excavator operator was digging, and then to be in the trench when pipe was set at the proper grade. The operator relied upon communication from the laborer to know when it is made to grade and ready to set the pipe. (Tr. 507–508.)

[22] On direct exam for the Employer, after Havill's direct testimony denying a specific conversation with Superintendent McKinley, Superintendent McKinley testified that he saw Havill at the shop at 3:30 p.m. and Havill told him that VanOpDorp left early. No one else was present. (Tr. 883.) I do not credit this version as it lacks context as to why Havill would volunteer this information.

On Monday July 8, 6 days after the Board hearing about the petition, VanOpDorp failed to turn in his timecard by the previous evening. Manager Needham sent Superintendent McKinley to VanOpDorp's jobsite to pick up the timecard.[23] Superintendent McKinley returned before lunch with the timecard. (Tr. 940.)

Superintendent McKinley noted that, for the previous Monday, July 1, VanOpDorp listed his time worked as 10 hours, which he did not match the timecard for Chad Havill, who also worked at the site. (Tr. 212, 855.) On July 1, Havill, a laborer working with VanOpDorp that day, allegedly came to the Employer's office to pick up some material and saw President Needham. President Needham testified that Havill said he was done early. Havill allegedly told President Needham, with Superintendent McKinley present, that VanOpDorp left the worksite at 3:30 p.m. that day. (Tr. 80–81, 339, 343.) Manager Needham opined that VanOpDorp was never early and presumed he started at 7 a.m. or later. (Tr. 212.) His timecard reflects the two machines on which he worked that day and includes 2 hours of overtime. Superintendent McKinley, who wrote on the timecard "wrong should be 1½ hour." (GC Exh. 11; R. Exh. 1.) Havill's timecard, which McKinley claimed he compared to VanOpDorp's card and was unchanged for July 1, reflects that Havill worked 10 hours. (R. Exh. 1.) The timecard is for the week ending July 6, 2019. Superintendent McKinley testified that the heavy equipment operators usually stop running equipment at about 5 p.m. so that they have time to fuel and grease the equipment; however, in this case, he testified that Havill told them VanOpDorp went home. (Tr. 340.)

VanOpDorp testified that information on the timecard was added to the card that he did not include—in particular, he listed his machine as a 210, which was a track hoe. However, the timecard also listed "272," which apparently is another machine, and is not VanOpDorp's handwriting. VanOpDorp testified that sometimes he would take his timecard in to the office on Monday morning or a Monday evening and McKinley never came to the jobsite to collect his card. (Tr. 419.)

C. On July 8 the Employer Accuses VanOpDorp of Failing to Correctly Lay Pipe at 11th Street Project in Moline

Manager Needham testified that, also on July 8 at about 7:30 a.m., he spoke with the Moline project manager, Erin Brunner, who told him that the Employer needed to rip out pipe, break up approximately 30 feet of street and readjust pipe. (Tr. 938.) Daniel Needham was working on the second phase on the 11th Street project. In the first phase, the employees set a sanitary manhole. Now Daniel Needham reported to Manager Needham the 2018 installation had "backfall" on it. (Tr. 212–213.) Daniel Needham took cell telephone pictures that purportedly showed the work to repair the area. However, on cross-examination, Daniel Needham waffled about whether the trench box met the OSHA requirements. (Tr. 848–848; R. Exh. 2(b), (e)). Manager Needham quickly estimated that the cost to the Employer would be $25,000 to $30,000. Jason Fulks, who worked with VanOpDorp on this project, testified that he, not VanOpDorp, was responsible for ensuring pipe was laid correctly. (Tr. 1038.)

Daniel Needham was in charge of phase 2 of the 11th Street project, which started in the summer of 2019. Daniel Needham testified that VanOpDorp was supposed to be in charge of

[23] Manager Needham later testified that he requested everyone's timecards to calculate a bill for a customer and Superintendent McKinley told him that he was going to the worksite to pick up VanOpDorp's card, which was the only card he did not have. (Tr. 939.)

grades, ordering supplies, and that he learned, perhaps on July 8, 2019, that the sanitary sewer was misplaced, leaving 4 inches of backfall. The result was that the Employer has to hire a company recut the street back further to fix the problem. Needham further testified that no other operator caused an error that required more than 8 hours to remedy. Daniel Needham took a series of pictures that purportedly showed the remedial work in program on July 8. Although the time on one picture showed 8:39, Needham did not know whether it was a.m. or p.m. and he was unsure of when he took the screen shots. (Tr. 817–825; R. Exhs. 2(a)-(g).)

Superintendent McKinley testified that VanOpDorp was the lead man and was supposed to get in the ditch to check the grading; the laborers only installed pipe. VanOpDorp was supposed to check the blue prints each day and ensure the pipe was installed at the correct grade. He also was supposed to order materials each day as needed. He was supposed to check with the inspector on the job for any changes. Superintendent McKinley also testified that the laborers are supposed to lay the pipe at the time it was done. He further testified that the 11th Street project took place during the fall of 2018. (Tr. 338.) Hamilton, on the other hand, obtusely admitted that operators did not have responsibility for checking the grade.[24]

The City of Moline provides the Employer with weekly reports on the projects. (Tr. 222.) After VanOpDorp's termination, Manager Needham compiled a report of costs, allegedly based upon the City Of Moline's weekly reports, material tickets and payroll information, which was $26,629.56. (Tr. 935; R. Exh. 8.) Manager Needham testified that the reports are emailed weekly and kept underneath the project file in the Employer's server. No reports have ever been deleted. (Tr. 932.) Unlike the 18th Street project, the Employer did not provide any weekly reports from the City of Moline about the error, which would likely have noted the claimed necessary repairs in the daily logs contained in each weekly report.

D. The Employer Terminates VanOpDorp on July 8

Manager Needham and Superintendent McKinley discussed VanOpDorp's timecard and what Havill allegedly said about VanOpDorp. Manager Needham then called Daniel Needham about the 11th Street project and made his calculations on the necessary repairs. (Tr. 942.) Manager Needham testified that he and Superintendent McKinley determined to terminate VanOpDorp, then decided to call President Needham and Daniel Needham to obtain their agreement to terminate. According to Manager Needham, "after lunch" that day the decision was finalized to terminate VanOpDorp that day based upon the timecard and the 11th Street project. (Tr. 942.) However, President Needham initially testified that the four managers jointly determined to terminate VanOpDorp based upon his allegedly falsified his timecard for the previous week. (Tr. 84–85.)

Manager Needham sent to VanOpDorp a text message to report to the office at 3:30 p.m. VanOpDorp reported as directed. He met with Manager Needham and Superintendent McKinley. Manager Needham first showed VanOpDorp some pictures of the 11th Street project for a pipe that allegedly had "backfall." VanOpDorp testified that Manager Needham did not give him a chance to examine the pictures before the managers continued. (See, e.g., Tr. 486.) They then showed him his timecard, for which they told him he falsified his time on July 1. They said that was stealing and could bring charges against him. For those two reasons, VanOpDorp was being terminated. The mangers provided VanOpDorp with no other reasons for his

[24] A lengthy discussion is provided in the Credibility section.

termination. (Tr. 1089.) The managers went to VanOpDorp's truck, and, with Bill Bouchard, helped VanOpDorp remove any of the Employer's tools.

VanOpDorp denied telling the managers that he worked only 8-1/2 hours on July 1. (Tr. 422.) VanOpDorp denied the Employer's claim that he said the Employer should be checking other employees' timecards because he was not the only one cheating. (Tr. 1027.) VanOpDorp, upset, told the managers, "I hope you guys have fun with the workforce you have now" and that they should watch everyone's timecards if they were watching his. (Tr. 423.) Bouchard testified he was with Superintendent McKinley and VanOpDorp and later Manager Needham while VanOpDorp's truck was emptied. Bouchard, corroborating VanOpDorp's version with some minor differences, testified that VanOpDorp repeated three times, that if "he" was going to play these games, everyone else's timecards should be checked. (Tr. 793–794.)

President Needham testified that the managers did not discuss the timecard problem with VanOpDorp at all because VanOpDorp also ran over ADA mats in May or June 2019. (Tr. 86; 353–354.) Superintendent McKinley agreed they did not perform any investigation. (Tr. 354.) McKinley testified he said nothing during the meeting but that Manager Needham told VanOpDorp that he made errors on the 11th Street project that would cost the Employer to fix and that "we proceeded to tell him that he falsified his timecards," which was stealing. (Tr. 352–353; 943.) Superintendent McKinley admitted it was only a single timecard. (Tr. 353.) Other than the timecard and the 11th Street project, the managers did not raise any other reasons for the termination to VanOpDorp. (Tr. 488.) The managers did not mention that VanOpDorp had been a lead person as a reason for the termination. (Tr. 489.)

Within minutes of terminating VanOpDorp, the Employer sent to all employees via its "GroupMe" application the following message:

> Everyone, Adam VanOpDorp is no longer allowed on any [Employer] property or equipment, if anyone sees him on any property or on any equipment owned by [the Employer] please let Curt, Dan, Joe or Nick know immediately, so the proper authorities call be contacted. Thanks.

(U. Exh. 42.)

E. After Discharge the Employer Creates a List of Reasons Why It Terminated VanOpDorp

On July 15, a week after VanOpDorp's termination, the Employer prepared a written document of what happened with the termination and additional reasons for VanOpDorp's termination showing a timeline from 2017 forward. (Tr. 918–921; R. Exhs. 14, 15.) According to the created document, the managers supposedly told VanOpDorp he was terminated due to the 11th Street project, with the need to tear out new pavement and re-excavate the previously installed sewer piping. They also told him that he lied on his timecard, which was a criminal offense. According to this version, VanOpDorp apologized and said he must not have checked his book when he completed his timecard. They instructed VanOpDorp to park his truck in the shop in order to remove all of the Employer's tools and fuel tank. With Superintendent McKinley

and "Bill" (sic, Bouchard) present, VanOpDorp allegedly stated he was not the only one cheating on the timecards and others were doing so.[25] The summary concluded with:

> Other items that leave ground for terminating
> -Multiple times being warned and told not to smoke [sic] in the cabs of our equipment (company policy)
> -Talking on the phone for personal reasons during company time, cannot even count how many times he was warned and always disobeyed

(R. Exh. 14.)

F. The Employer's Reasons To Deny Unemployment

VanOpDorp filed for unemployment payments. Responding to the claim by letter dated December 10, Office Manager Casie Morehead,[26] wrote:

> Needham Excavating, Inc. protests the claim of Unemployment Insurance. Adam was fired due to falsifying his timecard. When questioned about the wrong hours, he did not deny them.

(Tr. 217–218; GC Exh. 12.)[27]

G. The Employer's Additional Reasons to Terminate VanOpDorp

Despite the only reason given for unemployment protest, the Employer's answer listed the reasons why it terminated VanOpDorp. In addition to falsifying time records, the Employer claimed that about July 8, 2019, it learned that VanOpDorp failed to install pipe correctly on two jobs and cost the Employer over $300,000 to fix the problems. The answer then states: "The first job was called to [the Employer's] attention in 2019 while the second was learned about on or before July 8, 2019." Additional reasons are: he repeatedly violated safety rules by talking on his cell phone while operating the heavy equipment; smoking while operating heavy equipment; otherwise endangering the lives of persons he worked with; on April 14, he damaged a laser pole; on or about May 13, 2019 he destroyed six ADA warning panels stored on a concrete parking lot; he failed to install a window on heavy equipment; he failed to order pipe for the next day's work before leaving a jobsite.

1. The 18th Street project

During fall 2018, President Needham maintained that he received information that 300 feet of pipe were allegedly installed at the incorrect grade on the 18th Street project. President Needham testified that he did not run that project and left it to Nick Needham and Superin-

[25] Late in the hearing, this version was the one to which Manager Needham testified. (Tr. 941–943.)
[26] I find that Casie Morehead is an agent pursuant to Sec. 2(13) because Manager Needham imbued her with actual authority to make representations to the Illinois Department of Unemployment.
[27] The Employer contends that its letter to the Illinois Division of Unemployment is privileged by state statute and therefore cannot be used for the purposes of this hearing. (R. Br. at 48 fn. 9.) The Board holds that such state confidentiality laws are not binding for NLRB proceedings and is not "rendered inadmissible" by the state law. *Midwest Division—MMC, LLC*, 362 NLRB 1746, 1764 (2015), enfd. in relevant part 867 F.3d 1288 (D.C. Cir. 2017).

tendent McKinley. (Tr. 78–79.) President Needham testified generally that he did not know who the pipesetters on the job were; he was aware Fulks was on that job. VanOpDorp was not disciplined for the alleged errors that the Employer attributed to him until it was part of his termination in July 2019. (Tr. 79–80.) President Needham thought laborer/pipesetter Jason Fulks was "talked to" about it by Manager Needham and Superintendent McKinley but apparently received no disciplinary action. (Tr. 79–80.) VanOpDorp admitted he was the leadman on the project. (Tr. 479.) However, Fulks testified that VanOpDorp was not the lead person on the project and no one in management informed him that VanOpDorp was the lead. (Tr. 1039.)

Manager Needham testified that in May 2018 he told VanOpDorp that he would be in charge of the 18th Street project. (Tr. 206.) When Manager Needham stopped by the project in mid- to late June 2018, the City of Moline project manager complained to him that she asked VanOpDorp multiple times about getting things done, such as cleaning up the site and putting erosion control in place. (Tr. 206.) Manager Needham then testified that he told VanOpDorp that the site had to be cleaned that night. (Tr. 206.)

The 18th Street project shifted to a B phase about August 2018. About early October 2018, Manager Needham testified that VanOpDorp called him to report that the pipeline was 8 inches too low at the first manhole. (Tr. 207.) Manager Needham testified that he went to the jobsite and had a meeting with VanOpDorp, the city inspector and the city manager on site. The Employer began repairs a few weeks later. In November 2018, the 18th Street project was completed. In December 2018, the Employer obtained its job costs for the project and estimated that the problems with the pipeline cost it over $300,000.

The City of Moline's engineering department provided the Employer with weekly reports about the 18th Street project. The reports provide daily descriptions of installation of pipe. (Tr. 929.) About October 21, 2018, those reports began to show that certain sanitary sewers were replaced but work continued on other areas for the project. After November 1, 2018, the reports did not reflect any relaying of the sewer. The reports of the weeks ending October 27, 2018 and November 10, 2018 indicated that the project was expected to be completed on time, which was November 9, 2018. Even the week ending November 17, 2018 also showed an expectation of completion. However, by November 17, 2018, certain work could not be completed due to snowfall. By December 6, 2018, the project was suspended pending better weather or spring. (R. Exh. 6.)

The Employer maintained it considered terminating the entire crew but gave VanOpDorp a "pass" because he had been with the Employer for a long time. Apparently, no one was terminated for the 18th Street project problems. Manager Needham said VanOpDorp received ass chewings[28] for his conduct, including the mislaid pipe, but nothing in writing. VanOpDorp recalled that Manager Needham telephoned him about the problems on the 18th Street project and "laid into [him] pretty good" but did not threaten to fire him. VanOpDorp testified that he had a lead pipe setter who was supposed to be responsible for grades and checking benchmarks while he performed other digging work. (Tr. 480.) VanOpDorp also testified he was a co-lead at the project, but then said he was never called a foreman or lead man. The pipe setters also made more than scale. (Tr. 481.) VanOpDorp did not recall President Needham telling him to

[28] Ass chewing is vulgar slang meaning a severe verbal reprimand from someone in an actual or perceived position of authority over you. Sources: https://www.urbandictionary.com/define.php?term=ass%20chewing; https://www.lexico.com/en/definition/chew_someone's_ass.

check benchmarks each day before starting a project in the summer of 2018 or having a conversation about any added responsibilities. (Tr. 481–485.)

Jason Fulks was the pipesetter on the 18th Street project. (Tr. 482.) Fulks, employed from May 2015 until February 2019, testified that he instructed the operator to run equipment as he instructed and the pipesetter was responsible for ensuring the pipe was correctly installed. (Tr. 1037.) Fulks, consistent with his description of duties for pipesetters/laborers and operators, admitted that he was responsible for laying the pipe on the 18th Street project. (Tr. 1038.) Fulks also observed that Superintendent McKinley backed onto a manhole, which displaced the manhole by 4 inches. The error was not corrected at the time. (Tr. 1039.)

Operator Marshall testified that, in April or May 2019, he did not dig deep enough, resulting in a misgraded basement. He denied that he and Dan Needham worked longer than a day to correct the problem, which involved "8 or 7 loads" from dump trucks. (Tr. 759–761.) Marshall denied that he ever received any discipline. Respondent provided no exhibits to back up Marshall's claims of the length of time the project correction took.

2. Violating the unwritten cell phone policy

The Employer maintained that it had an unwritten policy not to operate machinery and be on a cell phone. President Needham testified that, during the summer of 2018, Fulks notified him that VanOpDorp was on his telephone "all the time" during the project, which made it difficult to keep up with the work needed to be performed. President Needham testified that he "confronted" VanOpDorp about this report and then let it go. (Tr. 75–76.) Superintendent McKinley told VanOpDorp "on a number of occasions" to stay off his cell phone while operating heavy equipment. (Tr. 460.)

Daniel Needham testified the cell phone issues with VanOpDorp began 10 years ago and had spoken to him about it since 2011. (Tr. 839.) Daniel Needham testified that he instructed VanOpDorp multiple times, the last in spring 2019, not to use his phone while operating equipment; however, Daniel Needham did not threaten to terminate VanOpDorp. Daniel Needham also testified that he received numerous complaints from the laborers about VanOpDorp's phone habits, particularly not feeling comfortable in the ditch while VanOpDorp talked on the phone and dated back with one particular employee with a date perhaps in 2017, 2018 or 2019. (Tr. 813–814.)

Employees gave varying accounts of VanOpDorp and others on their cell phones while operating machinery. Hamilton testified that the Employer maintained a policy precluding talking on a phone while operating heavy equipment, particularly around people. (Tr. 643.) He maintained VanOpDorp regularly talked on the phone while working equipment and did so using his shoulder and ear to keep the phone in place. He could not recall seeing VanOpDorp with ear pods. However, Hamilton never complained to management about it. (Tr. 644–645.) However, in 2018 the Employer questioned whether to obtain company phones based upon VanOpDorp's use of telephones, but the Employer did not identify what exactly prompted the conversation and redacted a portion of the conversation that Manager Needham represented that had nothing to do with the conversation. (Tr. 948; R. Exh. 4(e).)

Amber Nielsen testified that she was in field approximately twice per month since November 2018 and saw VanOpDorp and other operators on their cell phones. (Tr. 714.)

Daniel Needham testified that, since 2011, he spoke multiple times to VanOpDorp about not using his cell phone while operating equipment. (Tr. 838–839.) Brandon McKay testified that he saw VanOpDorp with the cell phone between his ear and shoulder while operating equipment, almost every day. (Tr. 733–734.) He testified that he saw other employees on cell phones while operating equipment approximately 5 times per week. (Tr. 738.) He reported it to Superintendent McKinley but could not recall which year it occurred and did not know whether Superintendent McKinley pre-approved VanOpDorp leaving the site. (Tr. 733–734, 738–739.) McKay also saw VanOpDorp wear ear pods while operating equipment after the employees were told to quit using phones while operating the machines; however, he would not know whether he was on the phone if he had the ear buds in place. (Tr. 734.) If a manager called the operator who was working in the field, the manager did not ask the operator whether he was operating machinery and needed to stop. (Tr. 741.)

Ian Macumber, an operator testifying on behalf of the Employer, said he "might" have seen VanOpDorp on jobsites perhaps a few times a month. In response to a leading question about whether he observed VanOpDorp 3 or 4 days in a single week, Macumber similarly testified he "might have." (Tr. 668.) Macumber also testified that "every day" he saw VanOpDorp on the cell phone with the phone propped up on his shoulder and assumed he was talking to his wife. (Tr. 669–670.) Macumber, on the next set of leading questions, was asked whether VanOp Dorp spoke to him about the Union and an organizing campaign, to which Macumber answered, "Probably yes. Very briefly." The next question was whether it was on company time, to which Macumber answered yes. (Tr. 675.) He did not recall seeing VanOpDorp talking to any union representatives on the job. (Tr. 675.) On direct testimony for the Employer, Brandon McKay stated that he observed VanOpDorp with the cell phone between his ear and shoulder and that he later observed VanOpDorp with ear buds.

VanOpDorp testified he used his cell phone with hands-free devices or if he was not operating equipment. (Tr. 456.) On a few occasions he would hold the cell phone with this shoulder and cheek. (Tr. 457.) He admittedly took calls from the Union during worktime until he received the email reminding him not to do so. (Tr. 464.) VanOpDorp admitted he spoke with Union Representative Shannon Vickers about February 2019 at a job project for less than 5 minutes. (Tr. 466.)

Macumber, on cross-examination, admitted that he and other operators operated cell phones while operating equipment and could not recall when he was told to stop. (Tr. 682–683.) Macumber admitted that employees could talk about anything they wanted during work time, e.g., sports, hunting. (Tr. 683–684.) VanOpDorp also observed others on the cell phones, such as Tracey Marshall, Ian Macumber, even Curt McKinley and Nick Needham when they were on machinery. (Tr. 465.)

3. Tardiness and leaving work early

Daniel Needham testified that VanOpDorp was late to work on numerous occasions, getting worse in late winter to spring 2019. (Tr. 842.) He then testified that Hamilton informed him that VanOpDorp was late over 2 hours on a Monday. (Tr. 842.) Brandon McKay, also an operator, testified that he worked frequently with VanOpDorp. He disputed that VanOpDorp showing up late for shifts. (Tr. 733.) He recalled VanOpDorp leaving before quitting time a few hours. McKay could not recall the year in which this incident occurred. (Tr. 733, 737–738.) Aaron Hamilton, an operator, worked with VanOpDorp on rare occasion. In response to leading questions, he observed that "there were times that [VanOpDorp] would pull in late" and "he

would leave before everybody else, which is pretty much in the construction world everybody works until that day's job is done." (Tr. 642.) He "believed" he spoke with Manager Needham that others were unhappy that they were working despite VanOpDorp's tardiness and leaving. (Tr. 642-643.) Hamilton testified about one particular project in which VanOpDorp arrived late but couched his answer that "I wasn't there very much with him." (Tr. 643.) Hamilton did not know how late VanOpDorp was at that project. (Tr. 643.) Hamilton also testified that he saw VanOpDorp on the phone while operating heavy equipment but did not know with whom VanOpDorp was speaking or when it occurred. Tracey Marshall, an operator called by the Employer, testified to a number of leading questions on direct examination. He testified that VanOpDorp arrived after 7 a.m. a few times a week. At this point, Marshall did not testify how many times a week or month he worked with VanOpDorp. In another leading question about whether VanOpDorp came in after the 7 a.m. starting time, Macumber testified, "I'm sure I have. I couldn't give you a specific date or a job or anything." (Tr. 673.)[29]

Tracey Marshall, on cross-examination, testified that he had seen other workers arrive late and reported those employees to management. He did not know whether those employees were disciplined. (Tr. 755–756.) He also testified that he did not report VanOpDorp to any bosses except Jeff Dunleavy, who was no longer employed with the Employer, and "possibly" Superintendent McKinley. (Tr. 755–756.)

4. Smoking in the cab of the equipment

VanOpDorp admitted that he was aware of the rule against smoking in the cab of equipment and that on a number of occasions President Needham told him not to smoke in the cab. (Tr. 471.) Manager Needham said he warned VanOpDorp multiple times about smoking in the machines. (Tr. 205.)

Hamilton further testified that he observed VanOpDorp smoking in the cab of equipment but testified it was for the length of VanOpDorp's employment; he also could not testify to the frequency of these. Hamilton testified that he reported VanOpDorp's smoking one time to management, approximately 6 to 7 years ago. (Tr. 658–659.) Although Hamilton testified that he did not work often with VanOpDorp, he testified he regularly saw VanOpDorp smoking the cabs of the equipment. Hamilton also admitted he did not work with VanOpDorp "a whole lot." (Tr. 645.)

In contrast, Fulks testified that he frequently observed operators, such as Tracey Marshall and Ian Macumber, and truck drivers, such as Amber Nielsen, smoking inside the equipment cabs and in the shop. (Tr. 1040.) Marshall and Macumber each smoke a pack and a half of cigarettes each day. Amber Nielsen testified that she smoked in the shop and in the truck and that she smoked 1 pack per day (Tr. 720, 723.)

Daniel Needham testified that other operators smoking frequently but got out of the equipment cabs to do so. (Tr. 850–851.) When pressed further, he did not know how much time the other operators lost on production or exactly how often the operators took smoking breaks. (Tr. 850.) Daniel Needham never reprimanded anyone about taking frequent smoking breaks and the Employer had no policy on the matter. (Tr. 850–851.)

[29] The Employer then asked whether Macumber saw him come in late 2 or 3 times in a single week. I sustained the objection to this leading question before Macumber could answer. (Tr. 673.)

5. Greasing and fueling machinery

The Employer's "Termination Timeline" on VanOpDorp has an initial entry, dated October 9, 2017, that VanOpDorp did not fuel and grease his machine. (R. Exh. 15; also see Tr. 865–866 and R. Exh. 4(c).) No other entries on that document reflect failures to fuel and grease machinery. Despite the dearth of information Daniel Needham also testified that VanOpDorp frequently failed to fuel and grease the equipment at the end of a shift, as required by an oral policy. He maintained it occurred as early as 2016 and continued, which worsened in winter and spring 2019 as a "constant problem." (Tr. 817, 841–842.) According to Needham, whenVanOpDorp was reminded, , VanOpDorp gave "lame" excuses, such as picking up his children. (Tr. 817.)

Marshall testified about the policy about greasing and fueling machines, then was asked whether VanOpDorp failed to fuel and grease machines, with the answer as yes; he then testified vaguely it occurred a few times per week and that he told management. He did not testify to when these incidents occurred or how often he worked with VanOpDorp. (Tr. 746–747.)[30] Regarding operators running out of fuel and failing to grease equipment, Daniel Needham admitted that others had similar problems. For the fuel, he testified first that it happened on occasions and then "not very often." He later testified that, if several pieces of machinery were operating, sometimes a field tank (Tr. 853–854.)

6. Additional complaints

Manager Needham had additional complaints about VanOpDorp's performance, such as slinging pipe over ditches with laborers present in the ditch. During its rebuttal, the Employer raised for the first time that a safety compliance inspection on June 24, 2016 revealed that a site on which VanOpDorp was working had 2 marks for unsafe practices. (Tr. 1004–1005; R. Exh. 24.) An additional incident was presented for May 3, 2018; however, Manager Needham could not identify whether VanOpDorp was responsible for one practice, regarding silica and cutting pipe. (Tr. 1004; R. Exh. 24.) Manager Needham admitted that these safety records were emailed to him the week previous to his testimony and likely had not seen the inspection from 2016 since that time. (Tr. 1006.)[31]

Daniel Needham testified that VanOpDorp did not order sufficient materials to supply operations at his worksite. He recalled one incident after VanOpDorp's termination. When

[30] Marshall also testified that, in March or April 2019, Chad Havill told him that he observed VanOpDorp talking to union representative Vickers "on company time." Marshall was not told whether VanOpDorp was operating machinery at the time. Nor did this testimony reflect whether he or Havill reported VanOpDorp to management. (Tr. 748–749.) At any rate, Marshall's testimony here is classic hearsay without any other indicia to warrant credit.

[31] The Employer offered the documents to show that it is a safe company with an active safety program. The Union strenuously objected that the Employer offered R. Exh. 24 documents for the truth of the matter asserted and therefore were hearsay. I granted admission and asked the parties to argue what weight, if any, the exhibit should receive. (Tr. 1111.) Implicit in Manager Needham's testimony, however, is the accusation that VanOpDorp was unsafe. I concur with the Union that I need not rely upon the exhibit to show that VanOpDorp was unsafe and reject it for the truth of the matter. These are documents that the Employer should have presented during its case-in-chief and not waited until rebuttal. The tardiness in presentation and Manager Needham's admission that he only obtained the records the week before hearing—almost 2 years after VanOpDorp's termination—instead demonstrates that the Employer did not rely upon these documents when it terminated VanOpDorp.

asked whether this incident was a basis for termination, Daniel Needham responded, "No. Well, it played a part of it" and admitted he learned about it after the fact. (Tr. 816.) On cross-examination he denied specifically telling VanOpDorp that he violated this policy but admitted that it happened every year for the last 5 years of VanOpDorp's employment. (Tr. 840–841.)

According to the Employer's termination timeline and testimony at hearing, on April 16, 2019, VanOpDorp reported to Manager Needham that he bent the laser pole on a bulldozer while working. (Tr. 210, 478; R. Exh. 4.) The repair consisted of bending back into its proper position, without taking it to a repair shop. (Tr. 478.)

Regarding a missing window from the piece of equipment that VanOpDorp failed to place at the end of the workday, President Needham admitted that he got out of his car to take a picture but he did not replace the window himself, claiming he was wearing good clothes. The machine cost $65,000. (Tr. 169–170.) However, President Needham did not identify any damage that took place to the machine and could not identify in which year this event took place and shifted between years when it took place. President Needham at first testified that he was 99 percent sure that this incident occurred in 2019 and he texted information to Daniel Needham, Jeff Dunleavy, and VanOpDorp. The text shows a date of June 28 without a year. President Needham then testified that Jeff Dunleavy was no longer employed by the Employer in June 2019 and that he was unsure about the year in which this event occurred. (Tr. 867-868; R. Exh.4(d).) Manager Needham's later testimony revealed that Dunleavy, who was superintendent for this project, resigned in December 2018. (Tr. 928.) VanOpDorp was not disciplined. (Tr. 872.)

H. Additional Disparate Treatment Evidence

When asked if the Employer terminated other employees between January 1, 2017 and July 8, 2019, President Needham said that some were terminated. (Tr. 91–92.) Rodney Bailey worked in the shop and was a truckdriver. (Tr. 92.) President Needham testified that Bailey's termination was left to Manager Needham, Superintendent McKinley and Daniel Needham. (Tr. 93.) Manager Needham testified that Bailey, whose job was truckdriver and mechanic, was terminated for showing up inebriated. (Tr. 219–220.) President Needham also had no idea about Joseph Neill, a short-term employee and was not sure he was discharged. (Tr. 93.) Manager Needham testified that Neill, a laborer, stopped showing up for work. (Tr. 220.)

Regarding safety, Manager Needham apparently did not know whether the Employer's drivers were tested and in compliance with the Department of Transportation's requirements for drug testing. (Tr. 990–991.) However, Havill reported to Manager Needham, by text message, that a heavy equipment operator had a substance abuse problem.[32] Manager Needham at first denied that the operator had a substance abuse problem, but the text message reflects that someone else also raised this concern. Manager Needham could not say whether this operator was sent for drug testing. (U Exh. 86.) Approximately 2 weeks after this testimony, during rebuttal testimony, Manager Needham presented training information to prove that the Employer was a safe company.

Regarding the alleged damage caused by VanOpDorp to the ADA panels, Daniel Needham admitted that other operators have similarly damaged equipment. (Tr. 828.)

[32] The testimony does not clearly establish when Havill and Manager Needham communicated on this matter.

IV. EVENTS REGARDING THE ELECTION

A. On July 9 the Employer and Its Hired Consultant Conduct a Mandatory Meeting

On July 9, 2019, three days before the election, the Employer conducted a mandatory meeting for employees. The Employer notified the employees the day before with a text telling them the meeting would take place at Dan Needham's residence at 7 a.m. (Tr. 609; U Exh. 30.) The meeting lasted about 1 hour and 45 minutes. Employee Spencer Werthmann recorded the meeting with a device in his pocket. (Tr. 611.) President Needham and consultant and attorney Bill Wheeler[33] were the primary speakers at the meeting.

The meeting[34] began with President Needham's opening remarks about the unionization efforts. President Needham stated that he was going to do everything "legally possible" not to let "this happen. [Wheeler]'s going to explain how bad that's gonna screw raises and all that up a little bit." President Needham told the employees that he was in federal court with the Union over Superintendent McKinley's benefits and that the Union lied to him. He further said that any word from Union President Marshall Douglas could not be trusted and that Douglas was a "fucking liar." He said the only thing the Union wanted was to "break" President Needham and that the Union was using the employees to get to him. President Needham also referred to other businesses in the area, stating that they had problems getting business after they were unionized.

The Employer also presented a consultant, Bill Wheeler, who stated:

> And you hire and pay a Union to try and get you more. Or even the same what they have provided for you without you and having to pay for it. That's basically what you're doing and they have at least a year once the election to try and get a contract that does that. If they don't have a contract after a year, you have a right to call for a decertification vote like you did when you voted them out before. But if you don't call for that vote, you have to continue to bargain until you get a contract. During that whole period of time you fall under what are called laboratory conditions of the National Labor Relations Act. And I'm gonna share some things with you from this book. What that means is that we can't change your pay, we can't change your benefits, we can't change your job until you get a contract . . . .

Wheeler later reiterated that "the lawyer" would not allow the Employer to change anything during negotiations. President Needham's interpretation of that information was "that if the Union won the election, the Employer would enter negotiations and "all raises would be suspended until the negotiations were done." Even the annual raises would stop. (Tr. 148.)

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[33] Wheeler solicited President Needham after discovering that the petition had been filed.

[34] The Union transcribed the meeting for the record and provided a copy of the transcript to Respondent for its review approximately 1 week before the hearing resumed on May 10, 2021. (Tr. 1005–1006; U Exh. 62.) Respondent objected to the exhibit on the basis that not all the parties were identified in the transcript. Respondent was offered the opportunity to submit corrections. I listened to this recording in its entirety. The main speakers are easily identified by their voices, particularly President Needham's introduction of Consultant Wheeler. Those voices that remain unidentified do not contribute to the allegations of unfair labor practices or any circumstantial evidence.

Werthmann testified that, based upon these statements, he should not vote for union representation.

Wheeler stated that the government actually said that the bargaining process could be "hazardous" to employees because they could end up with less. He cited "Coach Equipment."[35] Wheeler told the employees that he was earning $200 per hour for his time and estimated the Employer's lawyer was billing at $500 per hour.

Wheeler also told the employees that if they selected the Union, they could no longer go to President Needham or Manager Needham with their concerns. Wheeler, talking apparently about the *Excelsior* list, said that the Employer had to give the information to the Union and the Union would sell the information, so the employees were likely to receive more robocalls. He discussed that the Union could put employees on strike and if an employee was an economic striker, the employee could be replaced; he then said, "they've literally walked you off the job." (U. Exh. 29.)

Wheeler also said that 15 persons would vote, because one employee committed "job suicide" the day before this presentation. He said that the person was breaking the law. As everyone had been notified by email the day before about VanOpDorp's termination, it could have been no secret to whom he referred.

B. The Election

On July 12, 2019, the election was held, with the results noted above. On July 13, employees Chad Havill and Spencer Werthmann, by letter, resigned their employment because they were leaving on an unfair labor practice strike. (Tr. 186.)

VI. IN MARCH 2020 GRIPP OBSERVES THE EMPLOYER'S VEHICLES NEAR HIS HOME

On March 6, 2020, about 9:30 a.m., Gripp was working in his garage in Rock Island, Illinois, when his son came in from an auto parts store. His son reported that the Employer's white pickup was in front of the house. Gripp walked towards the vehicle, which had large Employer stickers in the back white Chevrolet pickup's window. The vehicle left before Gripp reached the vehicle. Gripp could not see the driver. (Tr. 549.) He was not able to see the license plates. (Tr. 552.)

Similarly, on March 31, 2020, Gripp was leaving for work with his current employer at 6:30 a.m. He again saw a similar vehicle parked about a half block south of his own pickup. He could not see whether the white Chevrolet pickup had the Employer sticker on it. After his vehicle was warmed up, Gripp drove to a stop sign. The Employer's pickup turned on its lights and was following him to the stop sign. The Employer's vehicle turned at the stop sign. When Gripp arrived at work, about 7 a.m., he telephoned Shannon Vickers and informed him of what happened. Vickers said the timing was right after the Labor Board issued a decision. (Tr. 550–551.) On cross-examination, Gripp testified that Ian Macumber, Curt McKinley and President Needham had access to white Chevrolet pickups as part of their employment. (Tr. 579–580.)

[35] Wheeler misconstrues the substance of that case. It discusses "bargaining from scratch" statements but makes no leap to the conclusion of the hazard to employees from bargaining, only the bargaining process and acceptable statements versus unacceptable statements that violate Sec. 8(a)(1). *Coach Equipment & Sales Corp*., 228 NLRB 440 (1977),

The Employer's vehicles do not have global position tracking systems (GPS) to identify where their vehicles are. The Employer presented a list of vehicles and cars parked on certain projects during the month of March. The list does not show the times when someone started use of the vehicle or when they stopped, nor does it show where the vehicle may have been before or after the shift. (Tr. 952–953; R. Exh. 9.) Therefore, the list does not disprove that anyone in one of the Employer's vehicles could have parked near Gripp's home.

Unfair Labor Practices: Credibility

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006).

Testimony from current employees tend to be particularly reliable when it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co*., 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). Where a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find the witness would not have disputed such testimony. *LSF Transportation*, *Inc*., 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc*., 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).

Throughout the hearing, the Employer used leading questions for its witnesses during its direct examination despite reminders to avoid doing so. A leading question is defined as one phrased in such a way as to hint at the answer the witness should give." *United States v. Cephus*, 684 F.3d 703, 707 (7th Cir. 2012) (cite omitted). Leading questions should not be used on direct examination except when the witness is called as a "hostile witness, an adverse party or a witness identified with an adverse party. . ." Fed.R.Evid. 611(c)(2). The Employer's leading and/or conclusionary testimony is entitled to little, if any, credit. *Ajax Tool Works, Inc*., 257 NLRB 825, 826 fn. 2 (1981) enfd. 713 F.2d 1307 (7th Cir. 1983); *Sheet Metal Workers Local 20*, 253 NLRB 166, 168 (1980). Also see *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 15 fn. 16 (2019) (testimony to direct questions that have broad hints and suggestions about answers or answers are not credible); *Woodline Motor Freight, Inc*., 305 NLRB 6 (1991), affd. 972 F.2d 222 (8th Cir. 1992). The Employer also used "talking objections" in which it signaled answers to its witnesses when they were examined by the Union or General Counsel. See, e.g., Tr. 108–109. The Employer was warned that objections that gave clues to the witness on answers would be reflected in the weight of the testimony and the credibility of the witness. (See, e.g., Tr. 109.) A number of questions from the Employer to its witnesses not only were leading, but conclusory. I cannot credit these answers when the witness merely capitulates to propositions presented by its counsel. *Lhoist North America of Alabama, LLC,* 370 NLRB No.112, slip op. at 11-12 (2021) and cases cited therein.

Much of President Needham's testimony is not credited. President Needham sometimes shifted the story or answered when no question was before him, even when under 611(c) examination. (Tr. 71–72.) An example:

Q. Okay. Now, isn't it true that Adam VanOpDorp was discharged on July 8th, 2019?
A. Yes.
Q And why was he discharged? What are all of the reasons that he was discharged?
A. Lack of competence on running the work, and costing us money in making huge mistakes that cost us money.
Q. Okay, but what all --
A. And lying on his timecard.

(Tr. 74.)

It appeared that President Needham forgot about Respondent's claim that VanOpDorp falsified his timecard and then presented this reason as an afterthought. Similarly, President Needham first testified as a 611(c) witness, with some vigor, that Gripp's mouth was the reason he was laid off; during the Employer's cross-examination after lunch, President Needham testified that the other managers were not happy with Gripp because he allegedly misrepresented that he could operate all equipment and other employees had to start equipment. (Tr. 187.)

President Needham testified that all employees are classified the same, then admitted that not all employees had commercial drivers' licenses. Commercial drivers' licenses were necessary for certain positions. In addition, President Needham's contention that all employees had to be able to do the same work was undermined when Manager Needham admitted that not all laborers were qualified to lay pipe as pipe setters. (See, e.g., Tr. 195.) Fulks corroborated and provided detailed information about the duties of operators and laborers.

President Needham freely gave disparaging opinions about the employees who no longer worked for him. For example, President Needham opined that Spencer Werthmann, a shop sweeper, "just a general nobody, who was the worst employee I have ever had," had given him a letter the day after the election that he was going on strike. (Tr. 186.) He disparaged Gripp and Gripp's wife; he also blamed them for his wife quitting her nursing job after years of working with Gripp's wife. These attempts to bolster testimony are not credited. See, e.g., *Northway Nursing Home*, 243 NLRB 544, 546 (1979). Similarly, President Needham's evasiveness on examination by General Counsel and the Union further demonstrate a lack of candor. Id.; *Inland Steel Co.*, 259 NLRB 191, 194 fn. 5 (1981). As a result, most of his testimony is uncredited unless it constituted an admission against interest.

Manager Needham's testimony is partially credited. Manager Needham served as the Employer's representative and was present throughout the hearing. Some of his testimony was internally and externally inconsistent. Manager Needham's version about a conversation with Havill on July 1 about VanOpDorp initially not only lacked context but also did not support President Needham's version as Manager Needham was unsure whether President Needham was present. It also conflicts with Superintendent McKinley's version of what happened. Further, he testified that he was 45 feet away from the conversation, making it less likely that he could clearly hear the conversation. I therefore do not credit Manager Needham's version of Havill's alleged July 1 report.

Likewise I do not credit that, on July 8, the City of Moline inspector reported to Manager Needham via phone that the work on the 11th Street project was at issue because, unlike the 18th Street project, the Employer never presented any of the weekly reports showing additional work was required.

On rebuttal on the last day of hearing, which occurred about 2 weeks after the previous days of testimony, Manager Nick Needham testified about numerous safety provisions that Respondent had in place, including drug testing.[36] However, on his initial examinations he had little, if any, knowledge of any specific safety programs, including drug testing and denied he knew laborers were drug test in summer 2019. During that time that Needham obtained safety training records from its contractor and presented a safety manual, updated as of May 2018. (Tr. 1084 et seq.; R. Exh. 22.) Needham testified he did not have knowledge of these documents during the previous days of hearing. The Union requested that Respondent's safety handbook be excluded from evidence because it subpoenaed all documents that were policies and procedures for the pre-election representation case hearing in 2019: At that time, Respondent stated it had no documents. At this late date, the Employer maintained that R. Exh. 22, its safety handbook, was neither policy nor procedure. I questioned Manager Needham about whether he relied upon these documents at the time of VanOpDorp's termination and his answer was ambiguous at best. (Tr. 1089.) Manager Needham also did not know whether employees were required to sign for the safety manual. (Tr. 1091.) He then testified that the safety handbook was distributed to employees in 2018 but did not know whether it was distributed in 2019. (Tr. 1091.) However, the training document for August 21, 2018 only shows that the safety presentation by a contractor discussed changes to the safety handbook and does not reflect whether employees received the handbook. (R. Exh. 23.) This development in Manager Needham's testimony demonstrates that the Employer did not rely upon these records when it terminated VanOpDorp. *Dorothy Shamrock Coal Co*., 279 NLRB 1298 fn. 1 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987) (ALJ properly excluded an article that was not in existence at time of layoffs and therefore the employer could not be rely upon it).[37]

The Employer led Daniel Needham about the reasons for which it terminated Gripp. The questioning in this area started without foundation for the question: "Other than getting somewhat slow, was there any other reasons that you discussed with one of the other managers why Brett should be let go?" Daniel Needham said Gripp was "mouthy." (Tr. 831–832.) I do not credit this response to a leading question where it was not established that Daniel Needham agreed that Gripp was terminated for a decrease in work. Another example of leading Daniel Needham was about reasons to terminate VanOpDorp: The Employer, on direct examination, stated: "Operators such as Adam were required to order material so they don't run out." Daniel Needham answered yes, then Employer asked, "Do you know if Adam followed that policy religiously?" He testified he knew he did not. Daniel Needham testified that he reviewed documents on the morning of his testimony. The documents were notes he made

[36] Manager Needham further testified that since the previous hearing dates Respondent was setting up a serious drug testing program. Setting up a program in 2021 does not show whether Respondent regularly enforced its own safety protocols in 2019 or earlier. Former employee Antonio Gonzalez testified that the laborers were drug tested in July 2019. (Tr. 1012–1015.) Manager Needham, in rebuttal, testified he was not aware of the drug testing. (Tr. 1084.)

[37] Respondent made a point of admitting them for the purpose of showing that Respondent was a safe company, claiming that the other parties said Respondent was not safe. However, the record reflects that the issue was not the overall safety record, but whether the alleged discriminatees were treated disparately about safety.

during witness preparation the previous week. He testified about an incident in which, after VanOpDorp's termination, it was discovered that VanOpDorp allegedly failed to order sufficient material on a job site. He testified that it played a part in termination and then admitted he did not know about it at the time of termination. (Tr. 816.) He testified that this problem had been continuing for "a couple of years" but worsened in the spring of 2019. (Tr. 816–-817.) Nothing reflects corrective action for this alleged issue.

Daniel Needham, on cross-examination, testified that VanOpDorp was terminated because falsification of timecards and screwing up the 18th Street and 11th Street projects. Without any question before him, Daniel Needham offered additional reason for termination: disregarding policies, such as smoking and talking on the phone. (Tr. 837–838.)

The Employer repeatedly led Superintendent McKinley during its direct examination, which makes for incredible testimony. For example, the Employer asked, "Was there a time when Adam complained toward the end of his employment about working on the job, that he felt that he was too good for?" Of course, McKinley's answer to this leading question was yes, with some further explanation from the witness. Because this section of testimony began with leading, I discredit the response.

The Employer's managers maintained that VanOpDorp stated, while his truck was being cleaned out post-termination, that they should check everyone's timecards for cheating. This version was documented a week after the termination, which I do not credit. The Employer's brief also maintains that VanOpDorp failed to produce a recorded version when he admitted he had been recording many conversations. The Employer assumed it was recorded. However, VanOpDorp's testimony was corroborated by Bouchard, a current employee called by the Employer and who testified contradictorily to the Employer's position. VanOpDorp testified that he said that if they [the Employer] are playing these games, they should check everyone's timecards. Bouchard, testified VanOpDorp said, three times, that if "he" was going to play these games, everyone else's timecards should be checked. (Tr. 793–794.) The Employer's version has a reference to cheating, which is missing from the corroborated version from VanOpDorp and Bouchard. Because a current employee testified contrary to the Employer's interest in this instance and corroborated VanOpDorp, the Employer's version does not constitute VanOpDorp's admission against interest and the Employer's version, which was created a week after the fact, is discredited.

The Employer's managers presented externally inconsistent testimony. As noted above, the Employer's managers testified inconsistently about the reasons for terminating VanOpDorp and Gripp. The external inconsistencies make for incredible testimony. They also testified inconsistently regarding when timecards were due to be turned in. Hamilton and VanOpDorp testified closely about when timecards were due, which was inconsistent with the managers' version. As Hamilton testified contrary to the Employer's interests and was corroborated, I credit this portion of his testimony.

Aaron Hamilton, an operator employed by the Employer, testified on the Employer's behalf. I do not credit many of his answers to the Employer's leading questions. Regarding his observations of VanOpDorp's timeliness in reporting and leaving work, Hamilton admittedly did not work frequently with VanOpDorp. When asked the responsibility for making sure the grade was correct when installing pipe, the transcript reflects the following exchange:

> Hamilton: Your ground man is ultimately the person that—I mean he's in the ground, he's on the ground where the measuring is taking place. At Needham Excavating the operator is normally the one that's setting the grades and making sure the numbers are correct.
>
> Attorney Niew: Are you okay. Do you need—
>
> Hamilton: No, I'm okay.
>
> Judge Steckler: You sounded a little short of breath. Do you need a break?
>
> Hamilton: No, I'm good.

(Tr. 645–646.) Hamilton first answers that the ground person was ultimately responsible and changed his answer in mid-course. He did not exhibit any symptoms of respiratory distress until he started to give that answer and changed course. In later testimony, Hamilton was asked whether he performed any other work as an operator and said that he helped laborers and plumbers as needed. (Tr. 653.) This answer does not support a finding that operators were in the trenches checking grades on a regular basis. I therefore find that Hamilton changed his initial answer from the correct version to one more favorable to the Employer. Similarly, President Needham testified that all employees perform all jobs, then testified that laborers work "in the hole." In addition, laborer Havill testified regarding the separation of duties of the laborer versus the heavy equipment operator, which corroborates Hamilton's and President Needham's original answers. Fulks further corroborated that the laborers/pipesetters were responsible for setting the grade and ensuring the pipe was laid correctly.[38] Based upon credited testimony, laborers, not the heavy equipment operators, are ultimately responsible for determining the pipe grade.

Upon other questions, Hamilton admitted that he did not know of anyone who was disciplined and that it was unlikely that anyone would tell him that they had received discipline. (Tr. 647.) The Employer then asked the leading question whether he considered discipline when someone chewed him out. (Tr. 647.) Hamilton then testified that would be discipline. (Tr. 647–648.)

Ian Macumber, another operator still employed by the Employer and testifying on behalf of the Employer, testified primarily to leading questions. His testimony is credited only to the extent it contradicted the Employer's position, such as that employees could talk about anything they wanted on the jobsite. Similar to Hamilton, he testified that he did not work very frequently with VanOpDorp, then agreed with the Employer that VanOpDorp was frequently late and on the phone without hands-free devices. These inconsistent statements do not show that VanOpDorp frequently was late or that he frequently used his cell phone.

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[38] Fulks, called only on rebuttal, left employment in February 2019 because the Employer refused to sign the Laborers' collective-bargaining agreement. (Tr. 1041.) He admitted that when he left, he defecated in one of the Employer's tool boxes. Although this conduct demonstrates antipathy to the Employer, other credited testimony corroborates the testimony regarding duties and responsibilities on the jobsites. See, e.g., *Parker Seal Co.*, 233 NLRB 332, 342 (1977), citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (relying on testimony of witness, who had strong reasons to "get at the Company," when other witnesses corroborate testimony).

Operator Tracey Marshall, called by the Employer, was asked how often he worked with Adam VanOpDorp. He initially testified that he worked with VanOpDorp several times, then to a leading question, agreed to "quite often." (Tr. 745.) Because of the shift, I do not credit that Marshall worked with VanOpDorp more than several times. The testimony that followed was about how many times per week VanOpDorp was late and failed to grease and fuel the equipment, because the answers were based upon the faulty premise that Marshall worked with him frequently, the answers cannot be credited to establish if or how often VanOpDorp exhibited the claimed failings. (Tr. 746.)

The Employer also called current laborer Caleb Hunter, who testified that he worked with VanOpDorp from April 2019 until VanOpDorp's termination about 90 percent of his time. Respondent asked a number of leading questions. I advised Respondent that it was telegraphing answers to Hunter and later asked Respondent to avoid leading. See *Richfield Hospitality*, supra. Despite testifying to working with VanOpDorp during that period, on cross-examination Hunter admitted he did not work on a certain number of projects with VanOpDorp. The portion of his testimony that is credited was when he testified contrary to the Employer's interests, stating he did not feel unsafe when working with VanOpDorp.

Mechanic Bill Bouchard, testifying on behalf of the Employer, is partially credited. At the beginning of his testimony, he claimed he left the Employer/K&K because the Union was following him in its cars. However, further examination revealed that his new employer paid more and was closer to his home, yet he said it was "not necessarily" better than his previous employment because he could do what he wanted with the Employer/K&K. (Tr. 801.) He also became argumentative during cross-examination and rephrased the question. (Tr. 799.) These factors demonstrated a tilt towards the Employer. These factors limit his credibility to undisputed facts and testimony that contradicted the Employer's position.

I credit Chad Havill's testimony in full. He contradicted the Employer's versions that he reported VanOpDorp leaving early on July 1. Havill testified consistently. The Employer contends Havill was not credible because he went on strike (which Havill stated was an unfair labor practice strike) and failed to make unconditional offer to return. I do not discredit Havill for striking and the Employer provides no basis to demonstrate that he was required to make an unconditional offer to return.

The Employer unsuccessfully attempted to prove Havill was untruthful about when VanOpDorp showed up to the jobsite on July 1. Hamilton, as with other employees testifying on behalf of the Employer, claimed VanOpDorp was frequently late, then admitted he did not frequently work with VanOpDorp, which undercuts the value of this testimony.

The Employer's witnesses were inconsistent in their complaints about Gripp and how it dealt with Gripp. According to Manager Needham, Hamilton began complaining almost immediately after Gripp's hire. Hamilton testified that he complained once to Superintendent McKinley and Manager Needham testified he told McKinley about it. Although the Employer listed Gripp's alleged inability to operate equipment as a reason for his layoff, President Needham testified that the biggest reason was that Gripp mouthed off about returning a check when he was overpaid. Amber Nielsen's testimony regarding Gripp speeding through the school zone was contradictory and shifted regarding to whom she reported the incident and when it occurred. She also shifted about telling Gripp about his speeding. See, e.g., Tr. 713–

715. This shift in testimony provided no basis that Gripp's alleged speeding was a reason for his termination.

The Employer maintains that VanOpDorp should not be credited because of his inconsistencies about whether he was a lead and because he produced no tape of the termination session. It also contends that VanOpDorp was inconsistent about his telephone calls with the Union. Whether the operators in general acted as leads is disputed throughout the hearing. The bigger issue is who was responsible for checking grades and depth of ditches. Laborers and Hamilton provide credited testimony about that point. Acting as a lead does not equate with the responsibility of checking placement of pipe or grade, so these statements are not inconsistent. See generally *Kapstone Paper & Packaging Corp.*, 366 NLRB No. 63 (2018); C*enterline Construction Co.*, 347 NLRB 322, 331 and fn. 19 (2006), review denied 247 Fed.Appx. 432 (4th Cir. 2007).

As for the allegation that VanOpDorp failed to produce a tape of the termination discussions, no record evidence shows that the Employer made a subpoena request to VanOpDorp. VanOpDorp's statement about checking timecards is corroborated by Bouchard, who, testifying on behalf of the Employer, gave testimony contrary to the Employer's position.

Analysis: Unfair Labor Practice Allegations

I. ALLEGED 8(A)(1) VIOLATIONS

A. Applicable Law

Under Section 8(a)(1), an employer may not "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). "In determining whether an employer's statement violates Section 8(a)(1), the Board considers the totality of the relevant circumstances." *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). The Board assesses the objective tendency of a statement to interfere with the free exercise of employee rights rather than considering either the employer's motive or employees' actual subjective reactions regarding the statement. *Miller Electric Pump and Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). Any testimony downplaying the severity or coerciveness of threats is immaterial because 8(a)(1) allegations are determined by an objective standard. *SunBelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 3 (2021). *Sage Dining Service*, 312 NLRB 845, 846 (1993).

The issue is how a "reasonable employee" would interpret the statement considering all surrounding circumstances. *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011). "The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group*, 339 NLRB 303, 303 (2003) (citation omitted). While certain employer statements, taken alone, may be considered noncoercive, they will violate the Act where they "take on the character and quality of coercive comments which accompany them." *Oak Mfg. Co.*, 141 NLRB 1323, 1325 (1963). Again, the standard is not subjective but objective, and violates when the

remarks reasonably tend to restrain, coerce or interfere with employees' rights as provided in the Act.

B. Allegations of March 18 Interrogation, Impression of Surveillance and Threats

General Counsel alleges that, on March 18, 2019, Respondent, by Joseph Needham, by telephone:

-Interrogated its employees about their union membership, activities, sympathies and the union membership, activities and sympathies of other employees;
-Created an impression among its employees that their union activities were under surveillance by Respondent; and,
-Threatened employees with discharge or other specified reprisals if they continued to engage in union or other protected activities.

Credibility is not at issue as VanOpDorp presented the recording of this telephone conversation, which took place while VanOpDorp was on a jobsite. President Needham asked about how things were going, specifically since decertification. When VanOpDorp complained about some personality clashes between the laborers and the operators, President Needham blamed the laborers and said, "The bitchin' needs to stop and if there's a fucking problem, then we need to fucking talk the problem through before everybody gets pissed." President Needham questioned VanOpDorp whether he heard bitching from other employees. VanOpDorp denied that he heard anything. During the conversation President Needham asked VanOpDorp if there were regrets about going nonunion or if it was the laborers. (Tr. 379.) President Needham talked about the offers made for a Laborers contract and the pension for potentially that contract. President Needham said the Employer owed the Union $340,000 and he did not want "to get into that fucking boat again." President Needham talked for a while about the performance of the 401(k) and the health insurance. President Needham said that he heard Ryan Drew, a business agent for the Union, contacted some of the employees to rejoin and asked if VanOpDorp had been contacted. President Needham discussed Dan Needham (a/k/a Boo) as an operator, then went back to the theme of hearing too much complaining. President Needham said, ". . . [T]hat bitching gotta stop. If you don't fucking like it here, then get the fuck out. . . . If you think you can get a better deal somewhere else, I don't fucking blame ya." President Needham concluded that he was checking to make sure everyone's opinions were matching and make sure VanOpDorp's opinion was the same as everyone else. He then said he heard that the Union was trying to get another vote. VanOpDorp said that if he heard anything he would let President Needham know. (GC Exhs. 3 and 4.)

1. Interrogation

The lawfulness of questioning by employer agents about union sympathies and/or activities requires a determination of "whether under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel Employees & Restaurant Employees v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). To determine coerciveness, five *Bourne* factors are examined:

(1) The background, i.e., is there a history of employer hostility and discrimination;

(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
(3) The identity of the questioner, i.e., how high was he in the company hierarchy?
(4) The place and method of interrogation, e.g., was employees called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?
(5) The truthfulness of the reply.

Bourne Co. v NLRB, 332 F.2d 47 (2d Cir. 1964).

The Employer and the Union had a history of hostility. In this particular call President Needham refers to the $340,000 the Union said he owed. At the time of decertification, the Employer provided employees with resignation forms to leave the Union. Regarding factor 2, President Needham wanted to if VanOpDorp had been approached and who was involved. President Needham also stated that employees should quit complaining or leave. President Needham made clear that he was not seeking this information out of idle curiosity. He specifically asked whether everyone was the same opinion, including VanOpDorp. The requirement to inform management of conversations with union representatives is unlawful. *Charles S. Wilson Memorial Hospital*, 331 NLRB 1529 (2000). Regarding factor 3, the inquisitor was the highest ranking official and part owner of the Employer. Regarding factor 4, President Needham called VanOpDorp on his personal cellular telephone, not in an office. President Needham called primarily for the purpose of finding out about the unionization efforts. Under factor 5, VanOpDorp was not truthful about who was contacting the Union or trying to unionize. VanOpDorp had given no prior indication to the Employer that he was involved in unionization. *Gunderson Rail Services d/b/a Greenbrier Rail Services*, 364 NLRB No. 30, slip op. at 36 (2016) (an employee attempting to conceal union activity supporting finding of unlawful interrogation). President Needham gave no assurances against reprisal for the questioning, which objectively demonstrates coerciveness of the questioning. *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1356–1357 (7th Cir. 1984). The Employer therefore unlawfully interrogated VanOpDorp about his union sympathies and the sympathies of others.

2. Threats

When determining whether a statement is an unlawful threat, the totality of circumstances is reviewed. *Gunderson Rail Services d/b/a Greenbrier Rail Services*, 364 NLRB No. 30, slip op. at 39 (2016). In the totality of circumstances, President Needham questioned VanOpDorp about his union activities and those of other employees. He made his opinion clear that he did not want the operators to organize again President Needham, who has the power to terminate employees, did not want to hear any complaints. However, President Needham went further, stating that if the employees did not like it, they could leave (expletive omitted). The Board's black letter law has long held that, this type of remark shows that union activities and voicing concerns about employment conditions make continued employment "incompatible." In re *Paramount Parks, Inc.*, 334 NLRB 255 (2001) (manager statement "if she didn't like it, she could leave" violates Section 8(a)(1)), citing *Padre Dodge*, 205 NLRB 252 (1973); *Amalgamated Transit Union Local 689*, 363 NLRB No. 43, slip op. at 4 (2015) (employer said "if you don't like it here, you can leave" in response to employee's grievance violative). I therefore find President Needham's "invitation" for complainers to leave violates Section 8(a)(1).

3. Impression of surveillance

The test for impression of surveillance is whether employees could reasonably assume from the employer's statements or conduct that their activities had been placed under surveillance. *BMW Mfg. Co.*, 370 NLRB No. 56, slip op at 1 fn. 5 and slip op. at 20–21 (2020) citing: *Greater Omaha Packing Co*., 360 NLRB 493, 495 (2014); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004); and, *Flexsteel Industries*, 311 NLRB 257 (1993). The test is objective and requires a showing that, under the circumstances, the employer's conduct interferes in some manner with employees' Section 7 rights. *Gunderson Rail Services,* 364 NLRB No. 30, slip op. at 38. A supervisor's isolated statement that he heard about unionization efforts through a rumor, alone, is insufficient to show that the employer impermissibly created an impression of surveillance. *Gunderson Rail Services*, 364 NLRB No. 30, slip op. at 36. No impression of surveillance occurs if an employer makes clear that the rumors came from employees. *Regency Grande Nursing & Rehabilitation Center*, 354 NLRB 530, 540 (2009), adopted in 355 NLRB 587 (2010), enfd. 441 Fed.Appx. 948 (3d Cir. 2011).

When President Needham asked whether VanOpDorp had been contacted about the Union after he mentioned he heard that the Union's business agent was contacting others. President Needham did not identify the source of the rumors, which squarely places the statements into an impression of surveillance. The Board has long held that an employer's statement that he "heard" that the Union was contacting employees is coercive and creates an impression of surveillance. *Wonder State Mfg. Co.*, 141 NLRB 1217, 1226 (1963), enfd. 311 F.2d 737 (6th Cir. 1964). The statement is not isolated when considered with President Needham's other statements during this conversation. I therefore find that the Employer violated Section 8(a)(1) by creating an impression of surveillance.

C. March 29 President Needham's Alleged Threats to VanOpDorp

General Counsel contends that, on March 29, President Needham called VanOpDorp after VanOpDorp told McKinley that he and other employees were upset with the Employer, particularly since the Employer had not lived up to promises made about the 2017 decertification. President Needham called VanOpDorp on his cell phone that same day. He apparently did not ask whether VanOpDorp was working. After VanOpDorp stated the same concerns, President Needham told VanOpDorp to start thinking for himself and to shut up and go back to work. He also said, "If you want to get back to the Union, I can make a call to Marshall Douglas if that's what you want." (Tr. 407.)

The Employer contends that VanOpDorp's testimony about these events should not be credited because he initially could not recall what happened and later had a clearer recollection. The Employer's documentation reflects that at least one issue VanOpDorp raised during these conversations was the Employer's failure to make good on its decertification promises about health insurance. (R. Exh. 15.) This portion corroborates VanOpDorp's testimony. However, the Employer's documentation, which was not created at the time of the events, fails to include that President Needham called VanOpDorp. I reject the Employer's self-serving belated documentation and credit VanOpDorp's discussion with President Needham.

The primary topic of discussion was the health insurances promises the Employer made for decertification. It concerned not only VanOpDorp but all the operators who decertified the Union in 2017. President Needham's remarks are coercive as he tells VanOpDorp to get

another job instead of complaining about workplace issues. See *Community Counseling & Mentoring Services*, 371 NLRB No. 39, slip op. at 11–12 (2021) (employer unlawfully threatened employee in response to protected protest).

D. April 11 Allegation of Soliciting Employee Grievances and Complaints

After the March 29 conversations, the Employer decided to meet with three operators in its offices.

"Employer solicitation of employee grievances or complaint during an organizing campaign may be considered an implied promise to resolve complaints elicited favorably for the employees." *Gunderson Rail Services*, 364 NLRB No. 30, slip op. at 38 and cases cited therein. The Supreme Court, in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), stated that the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." As the Court explained in *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964) (fn. omitted.):

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

It is well settled that the *Exchange Parts* principles apply to promises and/or granting of wage increases or other benefits if they are made in response to union organizational activity, regardless of whether a representation petition has been filed. *Network Dynamics*, 351 NLRB 1423, 1424 (2007); *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006). To establish such a claim, the General Counsel must first prove, by a preponderance of the evidence, "that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village Inc*., 319 NLRB 916 (1995).

Credibility is not at issue because the conversation was recorded. President Needham and Manager Needham met with operators, including VanOpDorp, about issues or problems and repeatedly stated that they wanted to get to the bottom of everything. The record reflects that by mid-March President Needham was aware that the Union was calling the operators. When VanOpDorp came into the meeting wearing union gear, the Employer was on notice that the Union was organizing. The record does not show that the Employer previously solicited grievances on a regular basis, which would have been permissible. *Gunderson Rail*, supra, slip op. at 38. The Employer's managers make offers to resolve VanOpDorp's medical bills, which allegedly occurred because of the Employer's promises to cover health insurance after decertification. Under *Exchange Parts* and its progeny, the attempts to resolve the employees' concerns at this time, when never done before, is coercive and violates Section 8(a)(1).

E. April 19 Allegation of Impression of Surveillance and Threats

General Counsel maintains that the Employer demonstrates hostility towards union activity and Section 7 rights when it issued a letter to VanOpDorp that threatened discipline if he engaged in union business on "company time" and threatened discipline if he continued to do so. (GC Br. at 22-23, citing, e.g., *Sam's Club*, 349 NLRB 1007 (2007). The Employer maintains that this allegation is also unrelated to VanOpDorp's termination and therefore should be

dismissed pursuant to Section 10(b) of the Act. In the alternative the evidence did not show that the conversations slowed production or that management received complaints. Additionally VanOpDorp's response demonstrates that the letter did not interfere with his Section 7 rights. (R. Br. at 26–27.)

The undisputed facts show that, in its email entitled, "Company Time," the Employer informed VanOpDorp that he was not to engage in discussions about the Union on company time and worktime, with the threat of future discipline. (R. Exh. 5.) The Employer undisputedly permitted conversations of other topics on worktime without any threats of discipline. An employer is permitted to make rules about worktime activity. *Caesars Entertainment*, 368 NLRB No. 143 (2019). Company time is broader and includes breaks and lunches. Because the Employer invoked both terms, the concept cannot be clear to a reasonable employee.[39]

As to the number of those discussions or interfering with work, it is disputed whether that the conversation the Employer cited, with little specificity, caused a slowdown in production. The Employer contends that testimony from Tracy Marshall, regarding a report he allegedly received from Chad Havill about VanOpDorp talking to a union representative during "company time" was not impermissible hearsay. (R. Br. at 27–28.) First, as with much of Marshall's testimony, I do not credit it because he was not honest about the operator's duties among additional reasons stated above. Even if I did credit Marshall, the Employer contends it was not for the truth of the matter but instead to explain why Manager Needham wrote his notification to VanOpDorp. Secondly, Havill's testimony in this hearing does not demonstrate that VanOpDorp created delays in production due to a conversation with a union representative.

The Employer's arguments are circular: Had the Employer not relied upon the truth of Marshall's report of his alleged conversation with Havill, it would not have acted as it did. So, the Employer does, in fact, present Marshall's statement as the "truth of the matter" and contends it warranted action. Havill remained employed at the time but the Employer never asked Havill about the claimed events.

The Employer's written statements prohibiting VanOpDorp's discussions and its threat of discipline are discriminatory as the Employer allows other forms of conversation but restricts discussions about the Union. *Communication Workers of America v.* NLRB, 6 F.4th 15, 27–28 (D.C. Cir. 2021) (employer permitting email conversations about other subjects but not union activities unlawful); *BMW Mfg. Co*., 370 NLRB No. 56, slip op. at 1 fn. 4 and (2020). The Board has long held such statements and threats to discipline along with it, as violations of Section 8(a)(1). See, e.g., *Jag Healthcare, Inc. d/b/a Galion Pointe, LLC*, 359 NLRB 699 (2013), adopted in 361 NLRB 1167 (2014), enfd. 665 Fed.Appx. 443 (6th Cir. 2016); *Gallop,Inc.*, 349 NLRB 1312 fn. 1 (2007) (discriminatory treatment towards prounion discussions without the same of antiunion discussions); *Capitol EMI Music, Inc.*, 311 NLRB 997 fn. 4 (2015), enfd. 23 F.3d 399 (4th Cir. 1994) (employer's discriminatory rule regarding talking about union and concurrent threat to discipline both unlawful); *Emergency One, Inc.*, 306 NLRB 800, 806 (1992) (employer violated § 8(a)(1) by restricting conversations about union while allowing others). Also see *Oberthur Technologies of America Corp. v. NLRB*, 865 F.3d 719, 724 (D.C. Cir. 2017), enfg. 364 NLRB No. 59 (2016), and 362 NLRB 1820 (2015).

[39] The Employer's contends it only told VanOpDorp to limit his union activity to nonworking time. (R Br. at 26–27.) The Employer cannot rely upon that contention because its letter included both company time and worktime, which are substantially different.

General Counsel also alleges that the Employer's notification to VanOpDorp creates an impression of surveillance. In *Flexsteel Industries*, 311 NLRB 257, 258 (1993), citing *Emerson Electric Co*., 287 NLRB 1065 (1988), a supervisor communicated his knowledge about rumors about an employee's union activity to that employee. The supervisor informed that he not only knew of his union support, but also that he was aware the employee may have initiated the union campaign and passed out authorization cards. In other words, he implied that he knew details of the employee's activity. The Board found that it never required "evidence that management actually saw or knew of an employee's union activity for a fact, nor do we require evidence that the employee intended his involvement to be covert or that management is actively engaged in spying or surveillance.

As above, the Employer did not provide any information that would have informed VanOpDorp that a fellow employee allegedly provided this information. *Gunderson Rail Services*, 364 NLRB No. 30, slip op. at 36. Rather, an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. Such is the case here, so the Employer's email constituted an impression of surveillance.

The Employer's other defense is that the allegations regarding the April 19 letter were not included in a charge until the second amended Charge, dated April 2, 2020, which is discussed below.

F. May 29 Allegation of Threat of Discharge

The complaint alleges that, about May 29, 2019, President Needham, at one of Respondent's jobsites, threatened employees with discharge if they engaged in union activities. Gripp testified, at the Employer's office, President Needham stated: "I'll tell you what, I got 20 guys on the payroll that [the Union] knows nothing about. If I find out who is feeding [the Union] information, they're done." (Tr. 542–543.)

I credit Gripp's testimony as the statement is consistent with President Needham's previous statements. Threats of termination for protected activities, such as talking with the Union, violate Section 8(a)(1). See generally *Castro Valley Animal Hospital, Inc*., 370 NLRB No. 80, slip op. at 17 (2021). Here, the threat is to anyone telling the Union about the Employer with the statement of termination. I therefore find that President Needham's statement on May 29 violated Section 8(a)(1).

G. June 10, 2019 Allegation of Creating an Impression of Surveillance

Gripp testified that on the morning of June 10, the same day of Gripp's layoff, Superintendent McKinley told him that he knew Gripp had been talking with the Union. Superintendent McKinley denied making such a statement.

I do not credit that this exchange occurred. Gripp maintained that he wore union t-shirts and had a union sticker on his vehicle. Employees called Gripp names and quit speaking with him. It would have been unnecessary for the Employer to state knowledge at this late date, the day of Gripp's termination. I therefore recommend dismissal of this allegation.

H. Alleged Surveillance at Gripp's Home in March 2020

I credit Gripp that he saw an Employer pickup truck at his home on the mornings of March 6and 31, 2020. However, Gripp could not see who was driving the pickup truck. Because Gripp could not tell whether the driver was a part of management, an agent or another employee, I cannot conclude that the Employer was responsible for the surveillance. I therefore recommend dismissal of these allegations.

I. The Employer's 10(b) Defenses for 8(a)(1) Allegations

The Employer contends that this allegation should be dismissed because it was amended into Charge 25–-CA–244670 on April 2, 2020, almost a year after the event occurred. Citing *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006) defenses to the Section 8(a)(3) originally alleged are different than the Section 8(a)(1), and analysis of *Redd-I, Inc*., 290 NLRB 1115, 1118 (1988). It also cites *The Carney Hospital,* 350 NLRB 627, 628 (2007), application dismissed 2008 WL 2223220 (D.C. Cir. 2008): There the Board stated that a statement made during the organizing period does not necessarily relate to 8(a)(3) allegations. The Employer raised its 10(b) defenses in its answer to several of the 8(a)(1) allegations. It contends that the first amended charge in 25–CA–239166, the second amended charge in 25–CA–244670 and the first amended charge in 25–CA–-245763 fell outside the 10(b) period.

The Employer contends that the Union delayed beyond the 6-month statute of limitations when, on April 2, 2020, it filed a second amended charge in Case 25–CA–244670, which alleged VanOpDorp's 8(a)(4) termination, regarding two allegations:

> Since April 8, 2019, the Employer, through its agents [President] Needham and [Manager] Needham interfered with, restrained and coerced its employees . . . by soliciting grievances and promising benefits to employees; and
>
> On about April 19, 2019, the Employer, though . . . [Manager] Needham . . . instructed employees not to talk about the union, giving the employees the impression of surveillance of their union activities and threatening employees with discipline.

The Employer also contends that amendments made in April and May 2020 to Gripp's layoff charge, 25–CA–245763, are beyond the statute of limitations. On April 2, 2020, the Union added two 8(a)(1) allegations that, on May 29, 2019, President Needham threatened an employee with discharge due to union activities and that, on June 10, 2019, Manager Needham gave the impression of surveillance of an employee's union activities. The latter allegation was further amended approximately 1 month later to show Superintendent McKinley, not Manager Needham, created the impression of surveillance. (R. Br. at 50–51.)

Section 10(b) requires that the charging party file its initial charge in a matter within a 6-month statute of limitations; the charging party's failure to do so bars any subsequent complaint. *Masonic Temple Assn. of Detroit*, 364 NLRB No. 150, slip op. at 1 fn. 1 (2016); *Positive Electrical Enterprises, Inc*., 345 NLRB 915, 918 (2005). The 6-month statute of limitations begins to run when a party has "clear and unequivocal notice of the violation," not when "a party sends conflicting signals or otherwise engages in ambiguous conduct." *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), citing *CAB Associates*, 340 NLRB 1391, 1392 (2003). Also see *Minteq Int'l, Inc*., 364 NLRB No. 63 (2016), review denied 855 F.3d 329 (D.C. Cir. 2017). The 10(b) allegation is not jurisdictional, but instead is considered an affirmative defense. *Federal Management Co., Inc*., 264 NLRB 107 (1982). The party alleging this affirmative defense, here

the Employer, has the burden of proof, which is met when the party demonstrates that the filing party had actual or constructive knowledge of the unfair labor practice. *ISS Facility Services, Inc*., 363 NLRB 261 (2015); *Broadway Volkswagen*, 342 NLRB at 1246.

To determine if an otherwise untimely allegation is closely related to the timely charge, the Board considers: (1) whether the otherwise untimely allegation and the allegations in the timely-filed charge are of the same class, "i.e., whether the allegations involve the same legal theory and usually the same section of the Act"; (2) whether the otherwise untimely allegation and the allegations in the timely-filed charge arise from the same factual situation or sequence of events; and (3) whether the respondent would raise the same or similar defenses to the otherwise untimely allegation and the allegations in the timely-filed charge. *Nestle USA, Inc.*, 370 NLRB No. 53 (2020), citing *Redd-I, Inc*., 290 NLRB 1115, 1118 (1988). The second prong should show a sufficient factual relationship, including whether the employer's actions were "demonstrably part of an employer's organized plan" for its resistance towards organizing. *The Carney Hospital*, 350 NLRB at 630.

In support of its position, the Employer cites *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006). There the Board found that untimely allegations for 8(a)(1) statements could not be "related back" to original timely charge regarding an alleged discriminatee's discharge. Regarding the first prong of *Redd-I*, supra, the legal theory was not the same: the 8(a)(3) allegation relied upon discriminatory motivation but the 8(a)(1) threats were based upon a theory of interference, restraint and coercion. Regarding the second prong of *Redd-I*, the Board maintains that the employer made a threat to two employees who not implicated in the 8(a)(3) discharge case involving a different employee and that the alleged threats occurred during the organizing campaign but the discharge afterwards: the Board finds that the timely and untimely allegations did not arise during the same "sequence of events." For the third *Redd-I* prong, the Board determined that the defenses for Section 8(a)(1) were different than the Section 8(a)(3). Therefore the 8(a)(1) threats were dismissed. *WGE Federal Credit Union*, 346 NLRB at 983.

I find that the amended allegations, though beyond the statute of limitations, are closely related and therefore properly included. Under the first prong of *Redd*-I for the instant case, events outside the 10(b) period show evidence of the employer's animus. In the first prong, the allegations are related to the employer's alleged intimidating and harassing conduct, and termination(s) of union supporters is an "end game" as part of intimidation and harassment of employees. The Employer's interrogation of VanOpDorp and statements made to Gripp are evidence of its animus towards the unionization efforts. The Employer's discriminatory notification to VanOpDorp that he could not talk about the Union also demonstrates animus towards unionization efforts and focuses of alleged discriminatee VanOpDorp. *The Earthgrains Co.*, 351 NLRB 733, 734 (2007) (late 8(a)(1) allegations related to timely 8(a)(3) allegation of alleged discriminatee's transfer).[40] Also see *CSC Holdings, LLC*, 365 NLRB No. 68, slip op. at 1 fn. 4 and slip op. at 4 (2017).

Here the second and third prongs of *Redd-I* are distinguishable from *WGE*, supra. See *Tesla, Inc.*, 370 NLRB No. 101 (2021). Under the second prong of *Redd-I*, like *Tesla*, the 8(a)(1) allegations relate to events during the organizing campaign and the Employer's

[40] The Board in *Earthgrains* suggests that the third prong in *Redd-I* is more permissive. However, the Board also examined the third prong was related to defenses that the alleged threats were related to the employer's business defense for a transfer, that the alleged discirminatee's performance was the reason for its discussion with him and was not a threat.

responses. I therefore find that the additional allegations are appropriately included in the complaint.

II. THE 8(A)(3) AND (4) ALLEGATIONS

A. Applicable Law for Alleged Mixed Motive Discipline in Section 8(a)(3) and (4)

Whether the Employer violated the Act in laying off Gripp and terminating VanOpDorp turns on whether the Employer had an unlawful motive to take these actions. In mixed-motive situations for cases arising for possible antiunion animus under Section 8(a)(3), the standard applied is found in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Also see *Tortillas Don Chavas*, 361 NLRB 101 (2014), and *Signature Flight Support*, 333 NLRB 1250 (2001). Under this framework, General Counsel must prove by a preponderance of the direct and/or circumstantial evidence that the employee's protected concerted activity or union activity was a substantial or motivating factor in taking the adverse employment action, i.e., that a causal relationship existed between that activity and the adverse action. This inquiry includes establishing that the employee engaged in protected concerted and/or union activity, that the employer knew or suspected it, and that the employer had animus against such activity.

If General Counsel makes a sufficient showing of causation, the burden shifts to the employer to establish by a preponderance of the evidence that even absent the protected concerted activity or union activity. *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 5–8 (2019). An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996); *T & J Trucking Co*., 316 NLRB 771 (1995). If the employer's reasons are found to be pretextual—reasons that are false or not in fact relied upon—the employer fails to sustain its burden and the inquiry is terminated. See, e.g., *Lucky Cab Co*., 360 NLRB 271, 275–276 (2014) ("finding of pretext defeats an employer's attempt to meet its rebuttal burden"); *Servicios Sanitarios De Puerto Rico d/b/a A-1 Portable Toilet Services*, 321 NLRB 800, 804 (1996); *Caruso & Ciresi, Inc*., 269 NLRB 265, 268 (1984). When pretext is found, dual motive no longer exists. *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124 (2002).

B. VanOpDorp's Termination under Section 8(a)(3) *and* (4)

1. Section 8(a)(3)

a. Union activity and the Employer's knowledge

VanOpDorp was very active in organizing. The Employer admits it knew about VanOpDorp's union activities, including wearing the t-shirt, placing a sticker on his card and providing email notification. By April 2019, the Employer notified VanOpDorp it allegedly received complaints that VanOpDorp was spending significant time on union business during the workday. (R. Br. at 14.) It also does not deny that President Needham saw VanOpDorp at the Board hearing in support of the Union.

The Employer misapplies *Volvo Group North America, LLC*, 370 NLRB No. 52 (2020). (R. Br. at 46–47.) There the respondent's manager maintained that the alleged discriminatee

disrupted preshift meetings with "concerns." The Board found that the alleged discriminatee's actions were insufficient to show protected union activity. Here, the record is replete with VanOpDorp's activities and the Employer's knowledge.

b. Animus

Direct evidence and circumstantial evidence based on the record as a whole can demonstrate animus. See *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019) (animus was shown through circumstantial evidence where the employer demonstrated open hostility to unions, employee's termination came a month after he publicly challenged an antiunion speech, employer shifted reasons for termination from a safety violation (not wearing steel toed shoes) to attendance issues). For direct evidence of animus, one need look no further than the Employer notifying VanOpDorp that he could not conduct union business on "company time" while allowing other employees to talk about any nonwork subject they desired without receiving discipline. *Lhoist North America of Alabama, LLC, A Subsidiary of Lhoist North Americ*a, 370 NLRB No. 112, slip op. at 1 fn. 3 (2021).

Factors supporting an inference of antiunion motivation include employer hostility towards unionization, timing of the adverse action in relation to union activity, and the employer's reliance on pretextual reasons to justify adverse action. *Roemer Industries*, 367 NLRB No. 133, slip op. at 16 (2019). A number of these factors examined here. *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117, slip op. at 4 (2021) (animus shown with disparate treatment of discriminatee); *Corn Bros., Inc.*, 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus).

The Employer was openly hostile towards unionization. The 8(a)(1) violations found above include impression of surveillance, interrogation, discriminatory statements regarding union talk on company/worktime, and threats of discipline for union activities. President Needham's speech, on July 9, also demonstrated hostility as he called one union leader "a liar." Wheeler, the consultant who followed President Needham as the Employer's agent in a mandatory meeting, also provided misinformation about unionization, including the 8(a)(1) violation stating that regular raises would be frozen during bargaining.[41]

The Employer demonstrates specific animus towards VanOpDorp's union activities when it sent him the email about alleged union conversation, which was discriminatory and threatened further disciplinary action. The Employer provided no evidence of issuing discipline for employees talking about anything they desired while they worked but singled out VanOpDorp's actions with a threat of further disciplinary action. *Lhoist North America of Alabama, LLC,* 370 NLRB No. 112, slip op. at 1 fn. 3 and 14 (2021). These actions also support disparate treatment. Id., slip op. at 16.

Both of these disciplinary actions on which the Employer relied at the time of VanOpDorp's termination demonstrate unlawful motive. In re *Lucky Cab Co.*, 360 NLRB 271, 274 (2014), adopted 366 NLRB No. 56 (2018) (compliance), enfd. 818 Fed.Appx. 638 (9th Cir.

[41] Although General Counsel failed to allege the July 9 speech as violation of Sec. 8(a)(1), it can be used as evidence of animus. If the Board should disagree with my findings that certain 8(a)(1) statements are not violations because they were alleged beyond the 10(b) period, they still constitute evidence of animus. *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 52 (2003), citing *Douglas Aircraft Co.*, 307 NLRB 536 fn. 2 (1992), enfd. sub nom *Sonnier v. NLRB*, 66 F.3d 336 (9th Cir. 1995).

2020). First, I do not credit the Employer's witnesses regarding their conversations with Havill on July 1 and 8 about VanOpDorp's timecard. The Employer's witnesses shifted, both internally and externally. The Employer's claims that VanOpDorp was frequently tardy and left early were also not worthy of belief as they never checked his timecards before the date of the termination. I infer that the Employer claiming that VanOpDorp had the habit of tardiness. To establish a habit, the Employer must show it had "adequacy of sampling and uniformity of responses." *Weil v. Seltze*r, 873 F.2d 1453, 1450–1461 (D.C. Cir. 1989) (internal quotes and citations omitted). Employees testified inconsistently about how frequently they worked with VanOpDorp versus how often he was late. Given the inconsistent nature of this testimony, the Employer did not demonstrate an adequacy of sampling, so lateness/tardiness as a habit is not established. The Employer's witnesses were inconsistent about when timecards were due, also making the Employer's version of VanOpDorp's alleged timecard fraud implausible.

Similarly, the Employer's failure to produce weekly reports from the City of Moline regarding the 11th Street project warrants an adverse inference. *Grosvenor Orlando Associates, Ltd.*, 350 NLRB 1197, 1198 fn. 8 (2007). The Employer maintained that it kept the City of Moline weekly reports in its computer files. It produced a number of weekly reports for the issues on the 18th Street project but none showing the work performed at the 11th Street project. The Employer presented no reason why it did not present documentation from the City of Moline on the 11th Street project. The Union further points out that the Employer did not show any underlying documents to support its damage calculations for this project. By failing to provide these documents, the Employer not only fails to show that VanOpDorp created problems at the 11th Street project, the Employer also fails to show the costs it claimed it incurred because of these alleged problems. Daniel Needham, who took the pictures allegedly relied upon by his brother, Manager Needham, in the termination, could not identify whether the photographs taken of the project were sent before or after VanOpDorp's afternoon termination. (Tr. 825, R. Exh. 2(f) and (g).) These inconsistencies add to the implausibility of the 11th Street project as a reason to terminate VanOpDorp.

The Employer maintained throughout the hearing that VanOpDorp was "the" lead person in these projects but also cites VanOpDorp's testimony that he was "one" of the individuals responsible for projects. (R Br. at 35 fn. 4, citing Tr. 482–485.) However, VanOpDorp denied that he was a lead man or foreman and the lead pipe setter was responsible for assuring that pipe was correctly laid; however, he did admit that he would have been viewed as a co-lead with his pipe setter, Jason Fulks. (Tr. 482.) VanOpDorp then twice denied recalling a conversation with President Needham in 2018 about working as the lead on a project. (Tr. 482–484.) The credited testimony reveals that the laborers, not the operators, would have been responsible for the problems on the 18th Street project and the 11th Street project. Testimony shows that the operators do not get into the ditches to check grades. The Employer admitted it considered terminating all employees on the 18th Street project and further admitted it did not do so.

Close timing between VanOpDorp's protected activities and termination presents additional evidence of animus. *Corn Bros., Inc.*, 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co*., 337 NLRB 443, 451 (2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive); *La Gloria Oil & Gas Co*., supra (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appeared suspect). Here, VanOpDorp made his union sympathies clearly known at the April meeting, continued activities of which the Employer was aware, and was terminated within 3

months of the Employer's definite knowledge, at the April 11 meeting. *LaGloria Oil & Gas Co.*, supra. He also appeared at the Board hearing—on behalf of the Union.

Maintaining that timing does not support animus, the Employer cites *Snap-On Tools*, 342 NLRB 5, 9 (2004) (R. Br. at 49–50.) The Board determined that animus was not a factor when the employer issued a warning to the alleged discriminatee 2 months after the election, so the alleged discriminatee's union activity had ceased. This case is distinguishable as VanOpDorp's union activities were ongoing, his appearance on behalf of the Union occurred less than a week before his termination, and the election had not yet occurred.

The Employer contends that, "If the Company harbored such antiunion animus in response to [VanOpDorp]'s union activity or his support for [the Union] as claimed by the General Counsel, it would not have continued to put up with Adam's persistent performance issues as long as it did." (R. Br. at 40.) The Employer raised the 18th Street project as a reason to terminate VanOpDorp. Notably, the Employer knew about the problems on this project in the fall of 2018. The Employer's tolerance for VanOpDorp's alleged conduct and not terminating him at an earlier point demonstrates the Employer used this "abrupt change" without a valid reason. See, e.g., *Norris/O'Bannon*, 307 NLRB 1236 (1992).

The Employer presented a number of reasons that did not exist at the time of termination. See generally *Lhoist North America of Alabama, LLC* 370 NLRB No. 112, slip op. at 1 fn. 3 (2021). The Employer's reasons here are "attempts to resurrect alleged past misdeeds" to buttress "some apparently legitimate reasons for discharge." *Booth Broadcasting Co.*, 223 NLRB 867, 875 (1976). The April 11 taped conversation with management and the three operators revealed that the Employer considered VanOpDorp was one of the operators on whom they could rely. The Employer's managers instead testified that VanOpDorp was on a downhill slide since at least the beginning of 2019. By July 8, and subsequently the Employer's July 15 list of what it considered as VanOpDorp's continued violations of works rules, the Employer changed its perspective on VanOpDorp's value.

Although the Employer's brief maintains that the main reasons for termination were the alleged falsified timecard, the 11th Street project and perhaps the 18th Street project, the Employer's answer and July 15 list of reasons for termination shows that the Employer added reasons after termination. At hearing the Employer highlighted a number of these additional reasons. The Employer's shifting reasons, as they were not relied upon at the time of termination, establish a strong case for animus. *Roemer*, 367 NLRB No. 133, slip op at 17 (2019), citing *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1973) (employer's failure to assert reason for adverse action at time of action can be indicative of discrimination).

The Employer's July 15 list and Employer's added complaints about VanOpDorp at hearing backfire on the Employer's rationale for terminating VanOpDorp. One such reason was smoking in the cabs of the equipment. Another was VanOpDorp's cell phone usage, which was disputed regarding whether VanOpDorp used earbuds. Yet another went back to 2017. The Employer also maintained that VanOpDorp was frequently late. However, the Employer never presented evidence that it checked his timecard before this incident. It only relied upon tardiness as a reason for termination after it created a list of alleged reasons to terminate.

In contrast to the litany of reason the Employer maintained, its response to the Illinois unemployment office listed only one reason for termination: falsification of the timecard. The

Employer admits that Office Manager Casie Morehead prepared the response at Manager Needham's direction. (R. Br. at 48 fn. 9, citing Tr. 217–218.) This letter is a "downward shift" in the number of reasons.

The Employer also cited safety concerns, which were not present and a number were not credited. For example, Manager Needham testified on the last day of hearing that the Employer had safety records that VanOpDorp signed. Yet his previous testimony demonstrated he had no knowledge of the training records or the inspections until about a week after the 4th day of hearing and 1 week before the last day of hearing. No evidence demonstrates that the Employer relied upon these documents or its safety concerns to terminate VanOpDorp. The Employer's claim demonstrates a shift in reasons, as late as the last day of hearing.

In another example of relying upon a shifting reason that did not exist at the time of termination, the Employer adduced testimony from Daniel Needham about VanOpDorp not ordering sufficient materials to supply operations at his worksite. Daniel Needham claimed this factored into the termination but reluctantly admitted that he learned of the incident after VanOpDorp's termination. (Tr. 816.) On cross-examination he denied telling VanOpDorp that he violated this policy but claimed happened every year for the last 5 years of VanOpDorp's employment. (Tr. 840–841.) This testimony also shows that the Employer presented reasons that did not exist at the time of termination. On the other hand, this testimony, if credited, shows that the Employer tolerated VanOpDorp's conduct for 5 years without correction. In either scenario, the Employer again seizes upon a reason that the Employer did not rely upon in the termination.

The Employer further lists other problems with VanOpDorp's performance in 2019. One was that VanOpDorp conducted union business on company time. As noted above, any complaint from Macumber was suspect because he did not work consistently with VanOpDorp. Similarly I do not credit that Curt McKinley and Dan Needham also received such complaints. (R. Br. at 14.)

The Employer's brief lists more reasons why VanOpDorp was not a great employee. One such complaint was that he ran over ADA panels in May 2019, which was also mentioned in its termination timeline. (R. Br. at 15.) VanOpDorp remained an employee.

The Employer also implied that it was exhausted by VanOpDorp's conduct. A conclusion that an employer is ultimately exhausted by an employee's bad behavior is not persuasive. *Garvey Marine, Inc v. NLRB*, 245 F.3d 819, 825 (D.C. Cir. 2001), enfg. 328 NLRB 991 (1999). Although the Employer's managers cite their frustration with VanOpDorp as a reason for termination, the Employer only created its laundry list of reasons a week after VanOpDorp's termination.

When an employer is otherwise lax about enforcement and targets a union supporter, such as VanOpDorp, the employer has not neutrally applied its disciplinary rules. *Advanced Masonry Associates v. NLRB*, 781 Fed.Appx. at 959. These additional causes for termination also show disparate treatment towards VanOpDorp. The Employer treated VanOpDorp disparately by requiring him to refrain from union discussions while permitting discussions on other topics at the workplace.

Similarly, the Employer treated VanOpDorp disparately regarding smoking in the cab of the equipment. Other operators smoked in the cabs of their machinery without consequences as they smoked a pack and a half per day. Fulks testified credibly that he observed these operators smoking in the cabs of their trucks. The Employer admitted it allowed others to take "smoking breaks" and had no explanation of whether it interrupted production. Given the amount that the other operators smoked, common sense says the other operators either smoked in the cabs or took frequent smoking breaks, which would have interrupted production. Either way, this information shows that Employer targeted union supporter VanOpDorp while permitting other operators and truckdriver Amber Nielsen to smoke ad lib in equipment

Tracy Marshall admitted that he incorrectly graded a basement in spring 2019 and had no repercussions for it.[42] He denied that he and Dan Needham worked a day to correct the problem, which involved "8 or 7 loads" from dump trucks. (Tr. 759–761.) The Employer presented no documentary evidence of this corrected work to show it was not on scale with VanOpDorp's mistakes, which leads to questions about its credibility. The Employer presented no evidence that it disciplined anyone else involved in the 11th Street or the 18th Street projects. The Employer, in relying upon a number of posthoc rationales for termination, admits it belatedly treated VanOpDorp more stringently than other employees. *Ozburn-Hessey Logistics, LLC*, 362 NLRB 1532, 1549 (2015), enfd. 689 Fed.Appx. 639 (D.C. Cir. 2016) (others violated safety rules but not disciplined similarly to union adherent).

The Employer argues that it did not discipline all union supporters. However, "an employer's failure to take adverse action against all union supporters, or employees who engaged in other protected activity, does not disprove discriminatory motive, otherwise established, for its adverse action against a particular employee." *Tito Contractors*, 366 NLRB No. 47, slip op. at 22 (2018), and cases cited therein; *Vision of Elk River, Inc*., 361 NLRB 1395 fn. 2 (2014), Therefore, the above reasons show that General Counsel made a strong showing of discriminatory motive towards VanOpDorp. Many of these same reasons establish pretext.

c. The Employer's burden and the role of pretext

When General Counsel makes a strong showing of discriminatory motive, Respondent's rebuttal burden "is substantial." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011), enfg. 355 NLRB 1319 (2010); *A.S.V. Inc. a/k/a Terex*, 366 NLRB No. 162, slip op at 1 fn. 1 (2018). Respondent must show it would have taken the same action for legitimate reasons even in the absence of protected activity. *Roemer Industries*, 367 NLRB No. 133, slip op. at 17 (2019). However, "[w]here an employer's purported reasons for taking an adverse action against an employee amount to pretext—that is to say, they are false or not actually relied upon—the employer necessarily cannot meet its *Wright Line* rebuttal burden" and discriminatory motive may be inferred. See *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019). If General Counsel demonstrates that an employer's proffered reasons are pretextual, the conclusion is that the employer is working to hide an unlawful motive. *David Saxe Productions*, 370 NLRB No. 103, slip op. at 20 (2021), and cases cited therein. ". . . [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp*., 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). When pretext is found, dual motive no longer exists. *La Gloria Oil*, 337 NLRB at 1124. Also see *Shamrock Foods*, 366 NLRB No. 117, slip op. at 27–28 (2018), and cases cited

[42] The Employer also contended that VanOpDorp's mistakes required more than a day to correct.

there (employer's shifting, false, or exaggerated reasons for an adverse action are evidence of unlawful motive); *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (finding that "an employer's shifting explanation for a discharge, or . . . its post hoc attempt to rationalize such a decision, are suggestive of a pretext").

VanOpDorp's termination on July 8 bears several indicia of pretext. The credited testimony finds that VanOpDorp did not falsify his time records, nor did he make any verbal implication to that end. In creating this reason for termination, the Employer maintains a sham defense. See *K&M Electronics*, 283 NLRB 285–286 (1987).

The credited testimony and lack of documentation on the 11th Street project also finds that the Employer did not provide sufficient evidence to find that another reason for termination was VanOpDorp's work on the 11th Street project in Moline: The Employer failed to provide any supporting documentation from the City of Moline, compared with the 18th Street project. It is difficult to believe that Moline did not provide a weekly report, as it did on the 18th Street project, that reflected day-to-day requirements and changes. Daniel Needham's initial testimony about could not place when, on July 8, he discovered problems on 11th Street project. The Employer's pictures have no time stamp and relies upon Daniel Needham's testimony to identify what they represent. I do not credit this testimony and therefore these reasons are pretextual. See *Con-Way Freight, Inc.*, 366 NLRB No. 183, slip op. at 3 (2018) (finding pretext based on unsupported claim in termination documents that employee "did not work well with customers and others"); *Harrison Steel Castings Co.*, 262 NLRB 450, 479 (1982) (finding that employer's defense "bore all the trappings of pretext" where it involved "exaggeration, implausibility, and contradiction"), enfd. in relevant part 728 F.2d 831 (7th Cir. 1984).

Manager Needham's testimony reflects that VanOpDorp was only told of a maximum of three reasons for termination, not the litany of offenses created after termination, in the Employer's answer and further expanded at hearing. The Employer therefore did not rely upon these reasons for termination, which is pretextual. In addition, these reasons show a shift from the Employer's April 11 position, at which time Manager Needham told a group of operators, including VanOpDorp:

> We know who can get production, who we stick, you know. . . . [W]hen you look at the schedule and say hey, we gotta be at 5 jobs tomorrow, we got 4 guys we can trust. Who we putting on this fifth job . . . . Which may very well men, you guys are getting stuck with the lower guys, which we know means you're gonna get less done but that 5th job is still getting something done . . . .

(GC Exh. 6 at 41; R. Exh. 21.)

Shifting explanations for the Employer's actions are strong evidence that the Employer's asserted reasons are pretextual. *Roemer Industries*, supra; also see *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 44 (1st Cir. 2004), enfg. 339 NLRB 262 (2003) (shifting explanations for discharge may serve to ground or reinforce a finding of pretext). An example here is the addition of safety reasons for termination, particularly those the Employer raised on the last day of hearing and had no evidence of them until a week before the conclusion of hearing. Instead, it serves as evidence of an additional after-the-fact attempt to justify the termination. *Community Counseling & Mentoring Services, Inc.* 371 NLRB No. 39, slip op. at 1 fn. 1 (2021) (employer's shifting explanations on terminating employees not premised on sincere concerns but pretext to mask an unlawful motive); In re *Lucky Cab Co.*, 360 NLRB at 274–275.

Toleration of poor conduct for years, which the Employer maintains it did, and then relying upon it for terminating an employee, like VanOpDorp, also demonstrates that the Employer's reasons are pretextual. *Metro-West Ambulance Service*, 360 NLRB 1129, 1030 fn. 9 (2014); *Andronaco, Inc. d/b/a Andronaco Industries,* 364 NLRB No. 142, slip op. at 13 (2016), citing *Phillips Petroleum Co.*, 339 NLRB 916, 919 (2003) (protected concerted activity). If one relies upon the Employer's after-the fact list, the Employer gave only reminders to VanOpDorp of his poor conduct. It allegedly "chewed his ass" for some of these violations, such as smoking in the cabs of the machinery. It also made a point of publicizing that VanOpDorp left a window out of a cab. It also claimed it repeatedly told VanOpDorp not to be on his phone. A number of employees also testified that they saw him on his cell phone, yet never reported it to management.[43] Daniel Needham admitted that he never spoke with VanOpDorp during a 5-year period in which VanOpDorp allegedly failed to order adequate supplies for jobsites.[44] Nothing demonstrates that the Employer actually relied upon these reasons for terminating VanOpDorp at the time of termination. Therefore, the Employer's rationales are pretextual.

d. Conclusion regarding the Employer's termination of VanOpDorp under Section 8(a)(3)

General Counsel presents a strong prima facie case that the Employer terminated VanOpDorp because of his union activities. The Employer's reasons for terminating VanOpDorp, a known union adherent and presumed leader in the unionization movement, are "inconsistent, contradictory, . . . undocumented or falsely documented and accordingly pretextuous." *Frances House, Inc.*, 322 NLRB 516, 522 (1996). Because the Employer's reasons are pretextual, it did not meet its rebuttal burden to show it lawfully terminated VanOpDorp. I therefore find that the Employer terminated VanOpDorp due to his union activities, in violation of Section 8(a)(3) and (1) of the Act.

2. VanOpDorp's termination and Section 8(a)(4)

a. Applicable law

The Board recently reiterated the importance of Section 8(a)(4) and employee access to Board processes:

> Section 7 of the Act protects the right of employees to utilize the Board's processes, including the right to file unfair labor practice charges. See, e.g., *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). The Board has no power to issue complaints sua sponte; Section 10(b) of the Act empowers the Board to do so "[w]henever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice . . ." (emphasis added). Accordingly, the Supreme Court has recognized that "[i]mplementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Congress intended employees to be completely free to file charges with the Board, to participate in Board

[43] See, e.g., Bouchard's testimony, which on cross-examination revealed that he had no idea when he saw VanOpDorp using his cell phone while working. (Tr. 798.)
[44] I do not include the Employer's entire list of reasons. The Employer's additional reasons add to its pretext.

> investigations, and to testify at Board hearings. *NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972). This is shown by Congress's adoption of Section 8(a)(4) of the Act, which makes it an unfair labor practice to discharge or otherwise discriminate against employees for filing charges or giving testimony under the Act. Id. at 121-122; see also *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968) ("The policy of keeping people 'completely free from coercion' [ ] against making complaints to the Board is . . . important in the functioning of the Act as an organic whole.") (quoting *Nash v. Florida Industrial Commission*, 389 U.S. at 238).

Prime Healthcare Paradise Valley, LLC, 368 NLRB No. 10, slip op. at 4–5 (2019).

The Supreme Court found that Section 8(a)(4) should be interpreted broadly due to employee protection granted by the Act, its legislative history, remedial goals and subpoena authority. *NLRB v. Scrivener*, 405 U.S. 117, 121–125 (1972). If employees are subpoenaed, even if not called to testify, they are considered protected under Section 8(a)(4). Id. at 124–125; *Williamhouse of Calif., Inc*., 317 NLRB 699, 715 (1995). In *Quality Millwork Corp*., 276 NLRB 591, 596 (1985), an employer violated Section 8(a)(4) when it terminated its employee 3 days after the employer advised the employee it did not have to respond to a Board subpoena, and then saw the employee at the Board's office.

Similar to the analysis in examining a possible 8(a)(3) violation, the analysis in Section 8(a)(4) also follows the *Wright Line* framework. General Counsel initially must establish that Respondent took adverse action, at least in part, due to the alleged discriminatee's participation in protected Board activities, such as filing charges, participating in investigations, and providing testimony. General Counsel must show that the employee engaged in such protected activities, the employer had knowledge of such activities, and the activity was a motivating factor in Respondent's adverse action. *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 561 (6th Cir. 2019), enfg. 366 NLRB No. 104 (2018). If the General Counsel makes this showing, the burden shifts to the Respondent, which must show by a preponderance of evidence it would have taken the same action even without the protected activity. *Airgas USA*, 916 F.3d at 561.

b. Discussion of the alleged 8(a)(4) violation

On July 2, VanOpDorp showed up at a Board hearing where the Employer's management was present. Although VanOpDorp did not have a chance to testify at the Board hearing, no Employer witness denied seeing VanOpDorp at the hearing. The Employer maintained that VanOpDorp falsified the timecard ending the week of July 5, which included the July 2 date reflecting that he did not work and attended the Board hearing. The Employer then terminated VanOp Dorp on July 8, 6 days later.

The Employer does not deny knowledge of VanOpDorp's Board activity on July 2, which demonstrates both protected activity of planning to participate in Board processing and the Employer's knowledge. *Nolan Enterprises d/b/a Centerfold Club*, 370 NLRB No. 2, slip op. at 3 (2020). Also see: *Rhino Northwest LLC*, 369 NLRB No .25, slip op. at 1 (2020) (testifying at hearing was motivating factor in 8(a)(4) violation); *Airgas USA, LLC*, 366 NLRB No. 104 (2018) (participation in Board activities), enfd. 916 F.3d 555 (6th Cir. 2019).

Timing supports a finding of pretext and animus. "Firing the worker soon after a critical protected event . . . logically raise[s] an inference of animus regardless of when the protected activity began." *Airgas*, 916 F.3d at 564 and cases cited therein. The Employer terminated VanOpDorp 6 days after the critical protected event, when he appeared for the Board hearing.

VanOpDorp's termination is differentiated from the union president's termination in *BS&B Safety Systems, LLC*, 370 NLRB No. 90, slip op. at 2 (2021). There the Board found the employer unlawfully terminated the union president pursuant to Section 8(a)(3) but not the 8(a)(4) allegation. In doing so, the Board reasoned that the employer's animus was based upon union activity and the activities involving the Board, including appearing at hearing and included as a named discriminatee in the complaint, were 6 months before the termination. It found these reasons were insufficient to support animus. Id. Here, the timing, less than 1 week between Board activity and termination, makes a strong showing for animus.

A pretextual explanation of the employer's actions supports an inference of unlawful motivation. *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 4 (2016), enfd. 713 Fed.Appx. 152 (4th Cir. 2017). The Employer must show that it would have taken the same actions even in the absence of protected activities. *Nolan Enterprises, Inc. d/b/a Centerfold Club*, 370 NLRB No. 2, slip op. at 3 (2020). As in the 8(a)(3) analysis, the Employer's reasons for terminating VanOpDorp were false. The Employer therefore fails to show it would have taken the same action without the protected activity. *S. Freedman*, supra. The Employer's shifts on reasons to terminate VanOpDorp also demonstrate its explanations are unreliable and the true reason for termination, here VanOpDorp's Board activity, is strengthened. *Airgas*, 916 F.3d at 566. I therefore find that the Employer violated Section 8(a)(4) when it terminated VanOpDorp.

C. Gripp's Layoff

Gripp's union activities consisted of attending union meetings, wearing t-shirts and placing a union sticker on his vehicle. The Employer's managers did not credibly deny that they knew about Gripp's union activities. Although I do not credit that Superintendent McKinley directly told Gripp that the Employer was aware of his union activities, other factors point to evidence of knowledge and animus.

Because President Needham was searching for union activity by mid-March, it is likely that he or other managers found that Gripp was involved with the Union. Gripp certainly did not hide wearing t-shirts or the sticker on his vehicle. A number of employees made comments towards Gripp and his union activity. The shop was not large and small shop doctrine could apply. *Coastal Sunbelt Produce, Inc.*, 362 NLRB 997, 1024–1025 (2015). In addition to small shop doctrine, these factors support a finding of knowledge.

As noted above in discussing the 8(a)(1) and (3) allegations, the Employer exhibited significant animus towards union activity. In addition, the animus was evident in the Employer's mandatory meeting, held July 9. The Employer presented a number of defenses that tend to prove unlawful animus and pretext. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1996) (if trier of fact finds stated motive for discharge is false, one may infer a concealed unlawful motive when surrounding facts reinforce the inference). The Employer relied upon shifting and unsupported reasons for Gripp's layoff, which points towards the true reason of union activity. *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984), enfg. 263 NLRB 50 (1982). The Employer's witnesses were inconsistent about why Gripp was

terminated. President Needham claimed the reason was Gripp's "mouth." Superintendent McKinley said it was because of a slowdown in work. The Employer's managers also were inconsistent about who made the decision to terminate Gripp.

The Employer maintained it no longer needed Gripp, so it laid him off. The Board need not accept this rationale at face value. *Flex-N-Gate Texas, LLC*, 358 NLRB 622, 633 (2012), citing *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 174 (3d Cir. 1962). Failure to provide this evidence leads to a conclusion that the Employer did not actually rely upon this reason. *Flex-N-Gate*, 358 NLRB at 632–633. The Employer utilized Amber Nielsen to drive trucks instead of her job in the maintenance department and hired a new truckdriver in August without contacting Gripp.

Toleration of conduct and then reliance upon it for separating an employee from his employment demonstrates animus and pretext. *Metro-West Ambulance Service*, 360 NLRB at 1030 fn. 9. The Employer tolerated Gripp being "mouthy" as early as fall 2018 but did nothing about it. (Tr. 833–834.) President Needham's testimony in is line with son Daniel. It is likely that President Needham he decided in mid-April to terminate Gripp but, according to his testimony, delayed because of the wet spring. The Employer's managers testified that Gripp was a problem from day 1 in operating the machinery yet tolerated his alleged shortcomings for months.

The Employer presented a number of witnesses who testified that they observed Gripp driving too fast or unsafely yet did not report it to management. The Employer did not inform Gripp this was a reason for the layoff. Amber Nielsen testified inconsistently about Gripp's driving. Other testimonies were to leading questions, which were not credited. The Employer's presentation of these witnesses also demonstrates that it did not rely upon these reasons to lay off Gripp. These reasons not only demonstrate animus, but also pretext. See generally *Coastal Sunbelt Produce, Inc.*, 362 NLRB 997, 998–999 (2015) I therefore find that General Counsel provided a prima facie case and the Employer's pretextual reasons were insufficient to rebut it. The Employer's layoff of Gripp violated Section 8(a)(3) and (1).

Representation Case: Challenged Ballots and Objections

On June 21, 2019, the Union filed Petition 25–RC–243735 to represent the following unit:

> Included: All full-time heavy equipment operators.
> Excluded: Other classifications, supervisors, managers, office clericals and guards.

(GC Exh. 2.)

The Employer failed to provide a timely prehearing Statement of Position to the Union. The Regional Director rejected the Employer's Statement, which included its proposal to include part-time workers and truckdrivers. (See, e.g., U Exh. 58—check.) The parties instead reached a stipulation for the composition of the bargaining unit. On July 5, 2019, the Regional Director issued a Decision and Direction of Election with the following stipulated bargaining unit:

> Included: All full-time and regular part-time heavy equipment operators employed by the Employer at its facility located at 137 North Main Street, Walcott, Iowa 52773

Excluded: All other Employees, and office clerical employees, managers and guards and supervisors as defined in the Act.

The Decision stated that the employees in the unit who were employed during the payroll period ending June 29 were to be included. The voter eligibility included employees in the unit who were employed during the payroll period ending June 29, 2019, and covered by the *Steiny/Daniel*[45] formula: Those who were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. Also see *Metfab, Inc.*, 344 NLRB 221, 221–222 (2005). The election was held on July 12.

The Tally of Ballots showed the following results:

Approximate number of eligible votes	17
Number of void ballots	0
Number of votes cast for Petitioner/Union	3
Number of votes cast against participating labor organization	5
Number of valid votes counted	8
Number of challenged ballots	9
Number of valid votes plus challenged ballots	17

The challenges are determinative.

The Employer and the Union filed timely challenges and objections.

I. CHALLENGED BALLOTS

The party challenging the ballots has the burden of proof to demonstrate why a voter is ineligible. *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). To be eligible to vote in the representation election, the alleged employee must be in the proposed bargaining unit on the eligibility date and on the date of the election. *Peirce-Phelps, Inc.*, 341 NLRB 585 (2004). For stipulated bargaining units, the determination starts with ascertaining whether the stipulation is clear or ambiguous. *Halsted Communications*, 347 NLRB 225 (2006); *Peirce-Phelps*, 341 NLRB at 585–586. If a classification is not within the "included" portion of the stipulated unit and the stipulated unit excludes "all other employees," the stipulation clearly excludes that classification. *Halsted Communications*, 347 NLRB at 225. Only if intent is unclear will a community-of-interest analysis be required. *Neises Construction Corp.* 365 NLRB No. 127 (2017). The unit, as stipulated, does not violate policy. See generally *Oberthur Technologies of America Corp. v. NLRB*, 865 F.3d 719, 727 (D.C. Cir. 2017). For employees that work in two categories, one of which is clearly as an operator, I will apply a dual function analysis.

[45] *Steiny & Co*., 308 NLRB 1323 (1992), and *Daniel Construction*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967).

The Employer challenged 2 ballots and the Union challenged the remaining 7. For the purposes of consistency in assessing the challenged ballots, I primarily rely upon the provided time records for the challenged ballots.

A. The Employer's Challenges

The Employer challenged the votes of the two alleged discriminatees, VanOpDorp and Gripp, who were terminated before the election. As an exception to the rule that the alleged employee must be in the bargaining unit on the date of election and eligibility date, a discriminatorily discharged employee is an eligible voter. *Superior Protection, Inc.*, 339 NLRB 954, 960 (2003), enfd. mem. 105 Fed.Appx. 561 (5th Cir. 2004), cert. denied 543 U.S. 1119 (2005). VanOpDorp undisputedly was a heavy equipment operator. As I have found that he was unlawfully terminated, I recommend that he is an eligible voter. *David Saxe Productions, LLC*, 370 NLRB No. 103, slip op. at 5 (2021); *Regency Grande,* 354 NLRB at 540; *Sun Tech Group, Inc. d/b/a St. Thomas Gas*, 336 NLRB 711, 720 (2001).

Gripp also was unlawfully terminated. The question further remains whether he worked enough time as a heavy equipment operator to qualify as a dual-function employee. The Employer presented Gripp's timecards, dated October 17, 2018 through June 10, 2019. (R. Exh. 10.) Despite having the timecards in front of him, Manager Needham only identified a few instances where Gripp operated heavy equipment. When questioned about Gripp's use of a Kubota on a jobsite on June 8, Manager Needham stated it was a utility vehicle and he did not consider it "heavy equipment" and at the time Gripp used it, he was hauling sand onto baseball fields at Cubby Park. (Tr. 983; R. Exh. 10.)[46] I do not credit Manager Needham's self-serving analysis of the Kubota as earlier testimony did not reveal that the Employer operated utility vehicles.

In many cases Gripp did not show the heavy equipment work that he performed on his timecards. Gripp testified to the following incidents in which he operated heavy equipment with the timecards, and I also consider the entries on the timecards themselves:

Date of operation and time used	**Equipment used**	**Task**	**Location in U Exh. 65**
Nov. 5, 2018 (2.5 hours)	135 Excavator	Load dump truck with dirt	N2593
March 27, 2019 (3 hours)		Load black direct off dirt pile into backfill	N2606
March 28, 2019 (2 hours, plus 1 hour)	310 combination backhoe	Load asphalt millings into dump truck, finish loading into Stang	N2606
April 13, 2019	330 excavator	Help tear down house (but also ran tub that day)	N2608

[46] The Employer, relying on Manager Needham's testimony, contends that Gripp only worked 2 days as an operator. (R. Br. at 69, citing R. Exh. 10 and Tr. 955–956.) A closer look is in order.

Date of operation and time used	Equipment used	Task	Location in U Exh. 65
(did not testify to amount of time)			
April 16, 2019 (8 hours)	Excavator	Loaded dirt	N2609
May 6, 2019 (did not testify to amount of time)	John Deere excavator	Loading dirt in semi	N2611
May 10, 2019 (did not testify to amount of time)	330 excavator	Cleaning property, including tires, tree stumps and remove rubber off tire rims	N2611
May 13, 2019 (done at end of day, did not testify to amount of time)	310 combination backhoe	Moving backhoe from one location to another	N2612
May 14, 2019 (11.5 hours total but does not break up driving and backfill, did not testify to amount of time)	27C mini excavator	Backfill dirt (but also drove dump truck to site)	N2612
May 15, 2019 (10.5 hours)	Sheepsfoot compact roller	Site grading	N2612
May 16, 2019 (5.5 hours)[47]	4840 John Deere with soil conditioner disk	Site grading/dry out soil to prepare for grading	N2612
May 24, 2019 (did not testify to amount of time spent)	770 bobcat	Fill rockbox using equipment	N2613

[47] The timecard reflects an additional entry for that date “site grade, RR-4” but Gripp did not testify specifically to that entry.

Date of operation and time used	Equipment used	Task	Location in U Exh. 65
May 28, 2019 (4.5 hours)	770 bobcat	Haul rock around job site (listed as haul 1 inch clean apparently)	N2614
May 30, 2019 (did not testify to amount of time)	Unknown	Haul Gr-14 rock to site, but then "get in machine to help"	N2614
May 31, 2019 (did not testify to amount of time)	770 bobcat	Haul rock at worksite, but also hauled rock from rock quarry in dump truck that day	N2614
June 3, 2019 (did not testify to amount of time)	Excavator	Took dump truck to site and used excavator to load dirt into dump truck (per testimony at Tr. 1071-1072)	N2615
June 5, 2019 (4.6 hours)	Roller	Hauled 5-6 loads of rock from quarry in a dump truck, then roll down the rock	N2615
June 10, 2019 (2 hours)	310 combination backhoe	Load pipe onto lowboy trailer (listed under cost code of mobilization)	N2558

Gripp was not a dual-function employee with sufficient hours to work as an operator. "The test for whether a dual function employee should be included in the unit is whether the voter performs unit work for sufficient time to demonstrate a substantial interest in the unit's wages, hours and terms and conditions of employment." *Harold J. Becker Co.,* 343 NLRB 51 (2004) (cites, internal quotes and ellipses omitted). This question is fact-specific in each case. Id. The number of entries for Gripp's timecards reflect 18 likely dates on which he worked as an operator.[48] The number of hours is uncertain for several dates as Gripp did not break out the hours for those dates. Gripp worked 55.1 hours on heavy equipment on the dates with hours listed. By the facts in this situation, I do not find that Gripp was a dual-function employee. See *Arlington Masonry Supply, Inc.*, 339 NLRB 817 fn. 3 (2003) (record only contained estimates time spent, with the highest estimate 25 percent). The Employer's challenge is sustained.

[48] The Union cites 20 dates on which it contends Gripp operated heavy machinery, which shows 43.5 hours worked on machinery. See U Br. at App. 2, citing U Exh. 81. It did not count the bobcat hours for June 1, which apparently is debatable.

B. The Union's Challenges

The Union, as the party attempting to exclude a voter under the challenge procedure, has the burden of proof for ineligibility. It challenged the ballots of Bill Bouchard, Timothy Hamann, Kenny McAdoo, Clint McKinley, Rick Needham, Amber Nielsen, and Jared Nielsen. The Union primarily challenged the ballots on the basis that they did not perform heavy equipment work or, if they did, they did not perform sufficient number of hours to warrant inclusion in the stipulated bargaining unit. The first group were employees, Bouchard and the Nielsens, worked in the K&K maintenance shop at the beginning of 2019. The Employer contends it later merged these employees into the Employer's operations. The Union maintains that the bargaining unit was clearly stated and the mechanics and shop manager in this group did not perform sufficient hours of operator work to warrant inclusion in the unit. The second group of purported employees in the bargaining unit, McAdoo and Hamann, were hired in spring 2019 to perform certain operator work; the Union contends that they did not meet the *Steiny/Daniel* criteria. Lastly, the Union maintains that Clint McKinley, brother of Superintendent McKinley, and Rick Needham, President Needham's brother, are related to management and should not be included in the unit.[49]

The Employer contends that, based upon President Needham's testimony that all employees perform all kinds of work (which is discredited), the challenged voters' ballots should be opened. However, the Employer relies upon the standard for a multifacility unit,[50] rather than the unit to which it stipulated on July 2. In examining these purported employees, as noted above, I am bound by the stipulated bargaining unit reflected in the Regional Director's decision, which limited the bargaining unit to full-time and regular part-time operators. Throughout the analysis I am mindful that a stipulation includes specific job classification and then excludes "all other employees," any other job classifications are excluded.

1. The maintenance shop staff of K&K: challenges to Bouchard, Amber Nielsen and Jared Nielsen

The Employer contends that, about April 2019, it moved employees from K&K Repair and Contracting, LLC (K&K) to the payroll and insurance of the Employer, thereby making them eligible to vote in the election. The Union contends that a number of challenged employees were employed by K&K, which was a mechanical repair shop across a parking lot from the Employer's facility. The K&K facility has a different address than the Employer's facility. The K&K shop also is identified by a sign.

K&K provided repair of heavy equipment and truck for the Employer and a few others. (Tr. 104, 599.) The K&K garage had 5 bays. (Tr. 105, 599.) The K&K shop can fit 10 pieces of equipment in the facility. (Tr. 105.) Maintenance employees repair the machines in the shop unless the repair is an emergency, in which case the repair is made in field. The maintenance employees have to know how to operate machinery and test it to ensure the repairs are complete. At some point it employed two mechanics, shop helpers and a supervisor. (Tr. 106.)[51]

[49] The determinations for these purported operators affect the outcome of the Union's objection that the Employer unlawfully packed the unit.
[50] R. Br. at 70–71, citing *AT&T Mobility Services, LLC*, 371 NLRB No. 14 (2021).
[51] At the time of hearing, President Needham testified that K&K no longer employed anyone. (Tr. 105.)

K&K had a different telephone number from the Employer. As a matter of record, the K&K employees were not employed at the same Employer address as what is stated in the agreed-to bargaining unit description: The proposed bargaining unit was limited to 17470 70th Avenue in Walcott. K&K's address was listed as 137 North Main in Walcott. No ambiguity exists here on exclusion of these voters. See generally *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117 (D.C. Cir. 2012), rev. denied and enfg. 356 NLRB No. 132 (2011).

a. Evidence does not support the Employer's contention that it merged K&K into the Employer's business organization

Pursuant to the Union's 2015 information request, the Employer denied it had any ownership interest in K&K, nor was it a member or manager of K&K. At the time, K&K was solely owned and managed by Manager Needham's wife, Carissa. K&K and the Employer kept separate bank accounts. Julie Needham performed accounting and payroll for the Employer, but a different person allegedly kept accounting records for K&K. The Employer and K&K used the same accounting firm and same accountant. Likewise, all corporate records for both entities were kept with the same law firm. The Employer's shareholders were President Needham with 499 shares and his wife Julie Needham with 501 shares. (U Exh. 18.) The K&K employees were not covered by the collective-bargaining agreement the Employer had with the Union. (Tr. 132–134.) K&K rented two to three service trucks, two of which remained labeled with K&K even as late as the hearing. (Tr. 143.) The manager at K&K was Bill Bouchard before the alleged merger. (Tr. 863.)

As part of a divorce settlement between Manager Needham and Carissa, President Needham bought K&K and assumed all financial liability, effective January 1, 2016. (Tr. 130, 135; U Exh. 88.) When asked whether new Articles of Incorporation or LLC agreement was filed at the time K&K switched hands, President Needham testified that his lawyer would have taken care of it. (Tr. 878.) No such documentation was presented. The Articles of Organization, filed with Iowa Secretary of State in 2019, remained unchanged. K&K remained registered with the Iowa Secretary of State in 2019, with the same address, through 2021. (Tr. 129-130; U Exh. 17.) President Needham denied any knowledge of the re-registration, stating his attorneys did so without his knowledge. (Tr. 182–183.) No notices were sent out for the alleged dissolution of K&K. (Tr. 879.) President Needham denied that any income was reported for K&K in 2020. (Tr. 627.) President Needham also maintained that Manager Needham, Superintendent McKinley and Daniel Needham were supervisors for K&K but could not testify credibly regarding when they started their duties as managers. (Tr. 864.)

President Needham testified that the decision to move employees from K&K to the Employer was made about summer 2018 due to insurance costs and in 2019 the change occurred, with the Employer allegedly having the paperwork to back up the decisionmaking and transfer. (Tr. 141–142.) However, no such paperwork was forthcoming. Manager Needham received the insurance carrier's information about a possible insurance change in in April 2018. The insurance carrier advised the Employer that it inquired too late to make a change in 2018. The insurance continued separately for K&K and the Employer in April 2018. (Tr. 967–968; R. Exh. 18.) Manager Needham, however, testified that he required further information to make the decision. The Employer did not provide any documents showing that it made this decision in 2018 or 2019. (Tr. 967–968; R. Exh. 16.) In contrast, the K&K workers' compensation insurance was renewed for the period of April 17, 2019 to April 17, 2020. (U Exh. 78.) Putting these facts in a light most favorable to the Employer, it grossly misrepresented what happened with the insurance coverage.

K&K initially performed maintenance and repair work outside of the Employer's equipment but now performs significantly less of that work. (Tr. 104.) When the K&K maintenance employees were allegedly moved to the Employer's employ in April, they performed the same kind of work for K&K, including going into the field to make repairs. (Tr. 174–176.) Employees working as operators note the job performed, the equipment numbers ran and hours on their timecards. In contrast, the mechanics recorded their time on timecards that reflected the job to which they went, and the machine repaired: They did not record any machine operation. (Tr. 704–705.)

Until March 1, the K&K employees kept manual timecards, which included the machine number on which the employee worked. This information was not included in the payroll record, which the clerical enters into the computer system. (Tr. 235.) "Office" denotes working in the office. For a mechanic, "shopwork" usually means work within the shop. (Tr. 237.) It also could be sweeping the floors, rebuilding buildings in the winter, or helping changing oil. (Tr. 236.) For Amber Nielsen, shopwork could also include obtaining parts for the mechanics or running errands for the managers. (Tr. 237.)

The K&K employee list for the period of June 27, 2018 through January 27, 2019, included Amber Nielsen, Jared Nielsen and Bouchard. (U Exh. 40.) The Employer maintained it transferred K&K employee to its payrolls as evidence on the following dates, including:

Jerad Nielsen	April. 9, 2019
Bill Bouchard (William T. Bouchard, Jr.)	April 16, 2019
Amber Nielsen	April 2, 2019 (Truck driver before she went to work for K&K, Tr. 140.)

(U Exh. 25.)

Bouchard and Jered Nielsen were mechanics who would repair equipment and sometimes attend to machines on jobsites. At the conclusion of the repair, the mechanic or the operator tests the equipment. Mechanics who go to the field to repair equipment may be present for several hours, including testing the equipment for 10 to 30 minutes. If the problem was intermittent, they might take longer to assess the equipment. (Tr. 640–641, 689-691.) Macumber gave the example of a busted hose, for which testing would take a maximum of 30 minutes. (Tr. 689–691.)

About June 28, 2019, only the Employer paid Werthmann for all hours worked in the K&K facility. (Tr. 607–608.) When he asked Amber Nielsen why he was received pay only from the Employer, she told Werthmann that the payroll was merged into one company instead of both. (Tr. 608.) During that time, Werthmann continued to perform shop work at K&K facility, which was no different than he did before the alleged merger. (Tr. 622.)

Regarding K&K, Aaron Hamilton, an operator employed for many years with the Employer, answered to leading questions that he observed K&K and Needham employees in shop at the same time and that those individuals went back and forth from the shop to the Employer's offices. (Tr. 637.) Hamilton admittedly made these observations when he turned in his paperwork, approximately once a week, in an envelope he placed in the parts room behind the Employer's offices. Each employee had its own envelope. He never saw K&K envelopes in the Employer's facility. (Tr. 638–639.) However, Hamilton also testified that he knew K&K and the Employer were separate businesses as K&K and the Employer maintained separate offices.

(Tr. 637–638.) What the Employer did produce were the payroll records for K&K and timecards showing the K&K employees shifted to the Employer's timecards in April. (Tr. 245–246.)

b. Analysis:

Bill Bouchard and Jered Nielsen were mechanics at K&K. Amber Nielsen was the shop manager for K&K. (Tr. 439.) Bouchard and Jered Nielsen were not listed in ScheduleBase. Amber Nielsen was a truckdriver and listed in ScheduleBase. (Tr. 440.) For the period of April 25 through July 18, 2019, the Employer presented the K&K employees' payroll records, which listed the employer as Needham Excavating Inc. The payroll records themselves do not reflect the type of work that each K&K employee performed, which does not demonstrate that these employees operated equipment It does not prove that these employees performed the sort of work that qualified them for inclusion in the bargaining unit. (Tr. 959 et seq.; R. Exh. 11.)

Bill Bouchard

Bouchard was a mechanic and "ran the shop" at K&K. (Tr. 790.) At the beginning of his testimony, he claimed he left the Employer/K&K because the Union was following him in its cars. However, further examination revealed that his new employer paid more and was closer to his home, yet he said it was "not necessarily" better than his previous employment because he could do what he wanted with the Employer/K&K and better medical benefits. (Tr. 801–802.) He also became argumentative during cross-examination by the Union and rephrased a question. (Tr. 799.) As a result, his testimony for his challenged ballot is partially credited.

Bouchard was salaried while working for K&K. (Tr. 239–240; U Exh. 39, 47.) Bouchard received notifications from President Needham, Manager Needham, Daniel Needham, and Superintendent McKinley when items needed repair. (Tr. 790.) He testified that he spent 60 percent of his time each week in the field making repairs. He stated that, after the repair was complete, he would have the operator run the equipment and if an operator was not available, he would operate the equipment himself for 30 to 60 minutes. (Tr. 791.)

In the K&K office, Bouchard completed work orders, entered information into the computer for billing and forward the information to the "front office." He was led to agree that K&K and the Employer merged, and testified he believed it to be true because he thought President Needham bought K&K. (Tr. 792.) His duties and reporting structure did not change when he allegedly worked for the Employer; he testified nothing had changed. (e.g., Tr. 793.) He did not know when the supposed change from K&K to the Employer took place and guessed 2016.

The Employer presented his payroll records for the period of April 25 through July 18, 2019. (R. Exh. 11.) Bouchard's timecards, since July 2019, reflect that he is only performing shop work at a location called "Construction-Yard." (Tr. 289.)

The timecards, and those records cited by the Union in its brief, demonstrate that Bouchard does not perform operator work except to test the equipment. Although mechanics must be able to operate the machines in order to test them, they do not consistently operate the machines as part of their jobs. Likewise, record evidence does not demonstrate that operators repair the machines. *Everport Terminal Services*, 370 NLRB No. 28, slip op. at 32 (2020) (mechanics operated machines to test and repair but did not actually operate like the

stevedores). As the stipulation is clear that the bargaining unit includes operators only, and Bouchard is a mechanic, not an operator, I sustain the Union's challenge to Bouchard's ballot. *Pacific Lincoln-Mercury, Inc.*, 312 NLRB 901 (1993) (challenged sustained when voter was not part of the stated unit and would instead be part of the excluded "all other employees").

Amber Nielsen

Amber Nielsen testified she was a shop coordinator for the Employer. She testified that she had been shop coordinator since November 2018 but previously worked at K&K. (Tr. 696–697.) Her job is to line up work for the mechanics, obtain parts to ensure completion of repairs and maintenance. (Tr. 696.) She is not a mechanic but performs some light mechanical work, such as changing the oil. (Tr. 266.) She maintained she drove a truck for K&K and for both K&K and the Employer, she went to jobsites. (Tr. 698.) She also testified that she used heavy equipment, such as a wheel loader, skid loader, and loader backhoe. Since July 2019, Amber Nielsen performed only shop work and no alleged heavy equipment work. (Tr. 288–289.)

She also worked for the Employer as a truckdriver around November 2018. (Tr. 267.) Amber Nielsen's timecards, through June 14, reflected work for K&K performing "shop work." (U Exh. 50 at K340-K420.) About June 8, her timecards reflect that she worked for the Employer driving a truck to bring materials on site. About July 14, she apparently worked exclusively for the Employer, but her timecards reflect delivering materials to jobsites. (Tr. 271-273.) The reason that Employer provided for assigning this task to Amber was due to the "wet spring." (Tr. 272.) Under closer questioning, Amber Nielsen admitted that she primarily operated the dump truck, carrying and picking up loads of dirt. (Tr. 706–707.) This answer is consistent with Macumber, who testified that when he saw Amber Nielsen on jobsites, she only drove trucks. (Tr. 693.)[52] Amber Nielsen then testified that, from November 2018 forward, she was out in the field only a couple times per month. (Tr. 714.) Amber Nielsen therefore was not an operator at all. I therefore sustain the challenge to Amber Nielsen's ballot, which shall remain unopened. *Pacific-Lincoln Mercury,* 312 NLRB at 901.

Jered Nielsen

Jared Nielsen was also a mechanic who worked for K&K. He performed no work for the Employer before April 2019. (Tr. 248, U Exh. 47.) The time records reflect that he consistently performed maintenance work. Like Bouchard, the record does not demonstrate how much time, if any he spends actually operating a machine, as any "operation" is incidental to his work as a mechanic. *Everport,* supra. I therefore sustain the challenge to his ballot.

2. Tim Hamann, hired in Spring 2019

Tim Hamann allegedly began work on April 17. (U Exh. 45 at N1476.) Hamann owns County Line Excavating. (Tr. 600; U Exhs. 20.) Hamann also operates a farm. Hamann lives across the street from one of President Needham's sons and is friends with Bouchard, Jered

[52] Amber Nielsen testified that she did not write down the codes for heavy equipment on her timecards because she was never told to do so. (Tr. 698–699.) However, I discredit this answer because the overwhelming testimony was that the Employer needed the codes for billing purposes and because she subsequently admitted she primarily drove the trucks.

Nielsen, Superintendent McKinley, Manager Needham, Dan Needham. (Tr. 600.) Hamann had his equipment serviced at K&K.

For 2018, the Employer gave Tim Hamann a 1099 tax form as an independent contractor earned from the Employer in 2018. (U Exh. 35 at N0088.) In 2019, the Employer hired Hamann., This time, the Employer, though Superintendent McKinley, denied that Hamann performed work for the Employer as County Line Excavating but worked directly for the Employer as an employee because of the wet spring in 2019.[53] (Tr. 888-890.)

As the Employer's W-2 for 2018 concedes that Hamann was not an employee in 2018, I examine time records from April 17, his hire date and thereafter. Hamann did not work more than a few hours each day. (Tr. 279; U Exh. 45.) He testified that he may have work "a little" in fall 2019. Hamann performed no work in 2020. (Tr. 277, 961.)

From the hire date of April 17 and ending June 22 of the same year, Hamann's timecards reflect 28 hours worked over 12 days. (Tr. 275–279; U Exhs. 34, 45.) When an employee works in what appears to be a temporary status and leaves, the question arises whether the voter had a reasonable expectation of returning. *Extendicare Health Services d/b/a Arbors at New Castle*, 347 NLRB 544, 547–548 (2006). The Employer's witnesses admit that they hired him because of the wet spring. Based upon the timecards, Hamann's services were no longer needed for the wet spring by June 22. No hours were provided between June 22 and the election. As Hamann worked no days in 2020, Hamann's employment was temporary, which does not show he was a regular part-time employee. I therefore sustain the Union's objection to Hamann's ballot.[54]

3. Dual-function employees

Kenny McAdoo

McAdoo was primarily a truck driver. Hamilton testified that McAdoo was primarily a laborer but also operated heavy equipment, such as a backhoe loader, skid loader, rollers and excavators. (Tr. 650.)

McAdoo was hired to operate the concrete recycler. (Tr. 437.) Superintendent McKinley's post-election affidavit to the Board in support of the Employer's objections stated that McAdoo ran heavy equipment 50 percent of the time, which was not supported by time records. (Tr. 345.) In the 12 months preceding the election, he only worked 13 days on heavy equipment. (Tr. 347.) The Employer's documentation in the pre-elections period shows he was classified as a laborer until June 29, then by July 1 "laborer operator," and the very next day was an "operator." (Compare U. Exhs. 84, 85, 86, and 87.) As the Employer's documentation and Superintendent McKinley's statements are admissions against interest, I find that McAdoo was not actually an operator. Further, this level of work is intermittent and does not show he was a dual-function employee. I sustain the challenge to McAdoo's ballot.

[53] The Union submitted the rain totals for the area as an exhibit to its brief. While the Employer may have relied upon this reason to hire more people for the springtime, I continue to rely upon the time records to demonstrate whether the Union appropriately challenged these purported employees of the Employer.
[54] The Union makes additional arguments, such as Hamann's personal relationship with Needham and McKinley and his customer relationship with K&K. (U Br. at 77–78.) As I find Hamann did not fit into the bargaining unit categories, I do not reach these arguments.

Richard (Rick) Needham

Rick Needham, Manager Needham's uncle and President Needham's brother, worked primarily as a truck driver. (Tr. 252–253.) Hamilton testified Rick Needham, "as a rule" was a truckdriver but can operate a disc roller and load trucks with excavators. He could not swear that Rick Needham operated heavy equipment before June 2019. (Tr. 650–651.) Rick Needham's timecards show that he worked approximately 8 days on heavy equipment in the year before the election. (Tr. 261–263; U Exh. 46.) This amount of time is less than the amount of time Gripp operated equipment. It is therefore insufficient to show he was a dual-function employee. Although the Union also argues that Rick Needham is a close relative of the highest managers in the organization, I do not reach that argument because he otherwise is not eligible for the bargaining unit. I therefore sustain the objection to Rick Needham's ballot.

Clint McKinley

Clint McKinley (Clint), Superintendent McKinley's brother, was primarily a lowboy driver and occasionally assisted in rolling and discing dirt until June 2019. (Tr. 649; R. Br. at 70.) Indeed, his classification was truckdriver during his most of his employment with the Employer. By late June or early July, the Employer suddenly classified Clint as a truck driver-operator-construction worker, where it previously classified him as a truck driver. (U Exh. 11.) However, Clint's classification shifted back to truckdriver by the time the Employer sent its voter eligibility list. (See, e.g., U Exh. 62.) The stipulated agreement does not include a classification for truck driver, so Clint is excluded from the bargaining unit as "all other employees." On that basis alone, Clint should be excluded from the bargaining unit.

The Union contends that Clint McKinley is either a manager for Employer and/or has familial ties to management to warrant exclusion. The Union cites that, in addition to his truck duties, Clint administers the Employer's Group Me messaging system and can add and remove persons from that function. (U. Br. at 10–11, citing, inter alia, Tr. 515–516, U Exhs. 34 and 42.) The only other persons who had this sort of access were managers. Clint also began to receive a salary in January 2019, which is significantly higher than an operator's pay: The Union cites that Clint's salary ran similar to upper management. (Id.; U Exh. 81.) These factors show that Clint has a special status that "align his interests more closely with management than with unit employees." *M.C. Decorating, Inc.*, 306 NLRB 816, 817 (1992), citing *NLRB v. Action Automotive,* 469 U.S. 490 (1985). The challenge to Clint McKinley's vote is sustained.

II. Election: Objections

Both parties filed objections to the election on July 19, 2019. In the Regional Director's direction for hearing, the Union's Objections 1, 3, 7, and Employer's Objections 2, 3, and 4 were set for hearing.

Under well-established Board doctrine, for conduct to be objectionable, it normally occurs during the critical period, which begins on the date the petition is filed, and runs through the date of the election, during which "laboratory conditions" must be maintained. *Ideal Electric Mfg. Co*., 134 NLRB 1275 (1961); *Dal-Tex Optical Co*., 137 NLRB 1782 (1962). Generally, conduct that occurs prior to the critical period is not considered objectionable. *Ideal Electric*, supra; *Data Technology Corp*., 281 NLRB 1005, 1007 (1986). Exceptions to this general rule exist, however. When prepetition conduct "adds meaning and dimension to related postpetition

conduct," *Dresser Industries*, 242 NLRB 74 (1979), it may be found objectionable. For example, prepetition conduct found to be truly egregious or likely to have a "significant impact" on the election may nonetheless be considered objectionable. See, e.g., *Servomation of Columbu*s, 219 NLRB 504, 506 (1975) (violence or threats thereof).

For all objections here, except Union Objection 1, the requirement is that an election's surrounding condition permit the employees an opportunity to have a "free and untrammeled choice" in determining whether to select a bargaining representative. *Purple Communications, Inc.*, 361 NLRB 575, 577 (2014), citing *General Shoe Corp.*, 77 NLRB 124,126 (1948), enfd. 192 F.2d 504 (6th Cir. 1951), cert denied 343 U.S. 904 (1952).

A. The Union's Objections

Union Objection 1: Since at least April 11, 2019, the Employer has been engaged in "unit packing," wherein it misrepresented existing employees, independent contractors and employees of another employer (K&K Repair and Contracting) as members of the bargaining unit and then caused those individuals to vote in the election in order to ensure that the result was "no" in regard to union representation and in order to unlawfully interfere with the exercise of free choice by bona fide unit employees. The Union incorporates by reference the content of Objection 7 into this Objection.

The Union contends that the Employer's inclusion of the challenged voters on the *Excelsior* list runs contrary to the defined bargaining unit in the Regional Director's Decision and Direction of Election. (U Br. at 79–83.) Also at issue is whether the "new hires" have some connection to management. *Golden Fan Inn*, 281 NLRB 226, 228 (1986). The Employer can overcome an allegation that it placed employees in the unit to dilute the union's strength if it puts forth a valid reason for placing a substantial number of employees into the bargaining unit. *Regency Grande*, 354 NLRB at 540–541 (relying upon law of Section 8(a)(1)).[55]

The "critical period" begins with the Union's filing of the petition on June 21. However, the Employer maintains a number of persons on its payroll allegedly beginning in April and they stayed until after the election. Because it provides meaning and dimension to this allegation, I consider the prepetition conduct. *Dresser Industries*, supra. The Union correctly points out that the Employer, after its April 11 meeting with the operators where VanOpDorp wore his union gear, doubled the size of its alleged operators by July 2019. (U Br. at 69–70.)

In *Airborne Freight Corp*., 263 NLRB 1376, 1380–1381 (1982), enf. denied on other grounds, 728 F.2d 357 (7th Cir. 1984), the judge found the employer hired a number of employees into the bargaining unit to dilute the union's majority. There the judge stated that the nexus between new hires and persons who were unlikely to be sympathetic to the union created "strong suspicions" that the employer sought these people with antiunion biases. Further the employer did not produce evidence to show the need for the additional employees and presented "no special justification" for the hiring practices. Id. In examining the packing allegation, I first examine the Employer's claimed shift of the K&K employees to the unit, then those that were hired essentially on a temporary basis.

[55] Inclusion of ineligible voters on the *Excelsior* list could also constitute a violation Sec. 8(a)(1). *Einhorn Enterprises*, 279 NLRB 576, 596–597(1986), enfd. 843 F.2d 1507 (2d Cir. 1988), cert. denied 488 U.S. 828 (1988) (8(a)(1) packing the unit violation found, and the evidence there also supported sustaining the objection).

Like *Airborne Freight*, supra, the Employer's documentation does not support a business justification for including the K&K employees in the bargaining unit. The Employer did not classify the K&K maintenance employees as the Employer's employees until after President Needham caught wind of the rumors of possible unionization, which he admitted occurred in March.

President Needham and Manager Needham did not follow the necessary steps to demonstrate that K&K had been absorbed into the Employer. The Employer only provided a written discussion in 2018, which stated the Employer was too late to make the change to insurance that year. No evidence supports the Employer contention that it actually changed the insurance coverage for K&K in 2019 or thereafter, and its witnesses, under oath, misrepresented what happened. As the Union points out, K&K's new workers' compensation insurance policy coincided with the dates the K&K employees were allegedly being absorbed into the Employer. (U. Br. at 76.)[56] In addition to the insurance coverage, the Employer does not demonstrate that it followed the corporate formalities consistent with its version of what happen with K&K. The Employer's reasons for including these persons in the bargaining unit falls flat when placed against the Employer's failure to follow corporate formalities and its blatant misrepresentation about its insurance. *Maxi Mart*, 246 NLRB 1151, 1151–1152 (1979), citing *Value City Furniture*, 222 NLRB 455, 460 (1975).

The rapid shift classifications of the K&K employees and those that were potentially dual-function employees demonstrates that the Employer was playing fast and loose with the employees' job titles without any corresponding change to their functions. The Employer also included others, such as Hamann, in the proposed unit who obviously did not belong there. Given the lack of credibility about the insurance and corporate formalities with K&K, I cannot credit any reasons the Employer provided for its attempt to include these people in the unit.

The present case is inapposite to *D&E Electric*, 331 NLRB 1037,1039–1040 (2000). There the employer hired three new employees. The record was devoid of employer's animus. The statement from the employer that was alleged to show evidence of unit packing was an insufficient to support unit packing due to its ambiguity. At least one of the newly hired employees remained employed on a full-time basis. The employer identified its needs for hiring. Id. The judge therefore found that the Union had not sustained its burden.

As opposed to *D&E*, supra, the above unfair labor practices and the Employer's July 9 meeting, below, demonstrate the Employer's animus. The Employer's argument, that the K&K personnel were on the payroll on the appropriate date, does not change the fact that they were not performing heavy equipment work regularly. Credited testimony demonstrates Respondent intended to pack the unit.

I therefore sustain Union Objection 1.

Union Objection 3: On July 9, 2019, the Employer held a mandatory meeting at the home of the son of Needham principal, Joe Needham, where the Employer and its "consultant" threatened employees with job loss. The consultant and Employer did so through statements including those asserting that the Employer's customers did not want unionization because of the possibility of a strike, unionization would make the Employer less competitive, customers would not engage [Employer] if it were union again, and union contractors such as Ryan Inc. had been

[56] The Employer's brief wisely omits any reliance upon this argument.

replaced by Taylor Ridge because of union activity. The Union incorporates by reference the content of Objection 7 into the objection.

When statements are alleged as objectionable conduct, similar to those alleged as Section 8(a)(1) violation, the question is whether the statements "had a tendency to interfere with the employees' freedom of choice." *Purple Communications*, 361 NLRB at 577 (internal quotes and cite omitted). The entire speech is taken as a whole. *Purple Communications*, supra. In doing so, the analysis is taken from the employees' point of view, particularly because of the employer's economic clout and the employees' dependent upon the employer. Id. at 577. The standard of review is objective. *Student Transportation of America, Inc.*, 362 NLRB 1276, 1277 (2015).

The Employer maintains that President Needham and Consultant Wheeler only made statements in line with Section 8(c) as the Employer made no promises of benefits or threats. (R. Br. at 72.) I disagree. A number of questionable statements arose at the meeting held at a manager's home, held less than 1 week before the election. The meeting was mandatory for all employees, including those classified above as K&K employees and those added to the payroll. The meeting was led by President Needham, the Employer's highest-ranking manager, and consultant Wheeler. He therefore was imbued with actual authority to speak for the Employer. I find that Wheeler is an agent under Section 2(13) as he stated to the employees that the Employer hired him, what he was getting paid and his stated purpose was to support the Employer's position to dissuade them from unionizing.

Both Consultant Wheeler and President Needham informed the employees that the raises would be frozen during negotiations. Employees received annual pay raises on their anniversary dates. A future pay increase that is non-discretionary, such as an expected annual increase, is a term and condition of employment. *Deaconess Medical Center*, 341 NLRB, 589-590 (2004). The Employer is obligated to maintain the status quo during negotiations. *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003). President Needham and Consultant Wheeler's statements hinge upon the Employer's requirement to bargain with the Union should the Union win the election. In doing so, the Employer blames the Union should the Employer be unable to provide the annual pay increases to employees. *Valmet, Inc.*, 367 NLRB No. 84 (2019) (threat to withhold regularly scheduled wage increase objectionable); *Atlantic Forest Products*, 282 NLRB 858- 859 (1987). When the statement is made by a high ranking official in a captive audience meeting, the effect upon employees is more than minimal. *Siemens Manufacturing Co.*, 322 NLRB 994 (1997). These statements are objectionable. *Alpha Cellulose Corp.*, 265 NLRB 177, 177-178 (1982), enfd. 718 F.2d 1088 (4th Cir. 1982). Also see *Uniontown Hospital Assn.,* 277 NLRB 1298 (1985).

Wheeler also made statements about the outcomes of striking. Although he provided some correct information that employees could be replaced in an economic strike, Wheeler said, "[T]hey've literally walked you off the job." Wheeler thus told employees that they lose their jobs if they strike. Wheeler's misstatement is objectionable because it interferes with the rights of employees in selecting whether to be represented. *Alpha Cellulose Corp.*, 265 NLRB at 178. This statement constitutes objectionable conduct

Consultant Wheeler stated an employee committed "job suicide" on the previous day. On July 8, the day before, the Employer notified all employees and others not in the proposed bargaining unit that VanOpDorp was no longer employed. Wheeler's statement promotes the implication that employees who support the union, even a long-term employee such as VanOpDorp, will be terminated. Disparaging an employee to other employees, when

accompanied by implicit or explicit threats, is objectionable. Compare *Haynes Motor Lines, Inc.*, 273 NLRB 1851 (1985) (employer's statements about union supporter did not include threats). The Employer and its hired consultant also included objectionable threats of freezing wages and that any strike would be the Union "walking you off the job" with the "job suicide" remark. This statement also constitutes objectionable conduct.

Consultant Wheeler talked about the amounts the Employer was spending on the organizational campaign: He estimated the Employer was paying its attorneys $500 per hour and his fee of $200 per hour. The implication is that the unionization efforts are costing the Employer money that it could otherwise put towards employees' pay. In *Gunderson Rail Services, d/b/a Greenbrier Rail Services*, 364 NLRB No. 30, slip op. at 41, the judge found that the employer repeatedly disparaged the union by discussing large sums of money the union was costing to defend against lawsuits it considered as baseless. Wheeler made the statement as fact, not opinion, which also is objectionable.

The Union also alleges that President Needham's remarks about what happened to other businesses because of unionization is also objectionable. This conduct is objectionable because it gives no basis for verifying the true facts.

The Employer's July 9 meeting included several objectionable statements. The Employer and its agent widely disseminated these statements at a mandatory meeting at which attendance was required for all proposed bargaining unit employees and then some. Union Objection Three is sustained.

B. Conclusion Regarding the Union's Objections

Union Objection 7: All of these comments and conduct coming in the context of a background of unfair labor practices as well as other unlawful conduct and a coercive atmosphere, including the conduct described in the already-pending 8(a)(1) charge regarding solicitation of grievances and threats, the 8(a)(3) charge (soon to be amended to include 8(a)(4)) concerning the unlawful discharge of perceived union supporter Adam VanOpDorp, and the layoff of perceived union supporter Brett Gripp, all actions which are designed to chill the free exercise of the employee right to select a bargaining representative.

Determining whether the objectionable conduct is sufficient to set aside an election is based upon 8 factors:

> (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of the misconduct by the opposing party to cancel out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Student Transportation, 362 NLRB at 1277.

The number of incidents include the Employer's termination of an open union adherent, VanOpDorp, during the critical period and shortly after he appeared to testify at a Board hearing, approximately a week before the election. These unfair labor practices add to the Employer's objectionable conduct. *Pro/Tech Security Network*, 308 NLRB 655, 662 (1992), enfd. 993 F.2d 1538 (4th Cir. 1993), cert. denied 510 U.S. 1091 (1994). I do not consider Gripp's unlawful layoff as it did not occur during the critical period.

The other objectionable conduct includes the Employer's attempt to pack the bargaining unit, which started before the critical period and continued thereafter. Lastly, the Employer and its consultant made numerous objectionable statements at a meeting in a manager's home.

The Employer's vote dilution attempt, stated in the Union's Objection One, interferes with employees' Section 7 rights to freely select a bargaining representative. *Maxi Mart*, 246 NLRB at 1160.[57] All bargaining unit employees and the purported additions from K&K and others were in attendance at the mandatory July 9 meeting. The July 9 meeting occurred less than a week before the election, which not only demonstrates proximity of misconduct but, for a reasonable employee, would be a persistent reminder. The Employer made no efforts to attenuate the effects of its conduct as it contended its efforts were lawful. The 8(a)(3) termination of VanOpDorp and notification to employees on 2 consecutive days, particularly with Wheeler calling it "job suicide," are significant and interfere with the laboratory conditions required in the preelection period.

The Employer's objectionable conduct therefore requires a re-run election because it "interfered with employees' exercise of free choice in the election." *Neises Construction Corp.*, 365 NLRB No. 129. Union Objection 7 is sustained.

C. The Employer's Objections

Employer Consolidated Objections 2 and 3: Ryan Drew, a business representative of [the Union] offered heavy equipment operators class A union cards without regard to a person's ability to operate heavy equipment. Under the collective-bargaining agreements a class A union card allows a person to operate all heavy equipment including cranes. This conduct began on or about July 1, 2019, and continued up until the day of the election. The offer to give employees class A union cards was conditioned on the employee voting "yes" in the Election.

Employer Objection 4: Ryan Drew, acting on behalf of the Union, offered [Employer's] employees health insurance to become effective on the day an employee goes to work for a union contractor. The Union somehow waived the waiting period which in this case is a number of hours worked before coverage becomes effective. The offer of insurance without a waiting period was conditioned on voting "yes" for the Union.

The Employer's objections propose that the Union promised benefits contingent upon employees voting in favor of unionization. The Employer, contending that the Union's alleged promises were objectionable, relies upon *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). See R. Br. at 72–73.

[57] Should the Board disagree that the additional employees should not have been included in the *Excelsior* list, the message to the K&K employees and others is equally clear about what the Employer does when faced with union organizing.

As before, the burden is on the objecting party, here the Employer, to bring forth evidence to sustain its allegations. *Jam Productions, Ltd.*, 371 NLRB No. 26, slip op. at 11 (2021). "Unions are allowed to describe preexisting benefits to which employees would ordinarily be entitled as union members." *Jam Productions*, 371 NLRB No. 26, slip op. at 10, citing *Dart Container of California*, 277 NLRB 1369, 1370 (1985). On the other hand, a union cannot make or promise to make, a gift of tangible economic value as an inducement to win support in a representation election. Id., slip op. at 9. The Employer must demonstrate, based upon an objective standard, whether the Union's conduct would reasonably "'have a tendency to influence' the outcome of the election." Id., citing *Gulf States Canners, Inc.*, 242 NLRB 1326,1327 (1979), enfd. 634 F.2d 215 (5th Cir. 1981), cert. denied 452 U.S. 906 (1981). The factors assessed are: the size of the benefit related to the stated purpose of granting it; the timing of the benefit compared to the election; and how employees would reasonably view the purpose of the benefit. *Jam Productions, Ltd.*, 371 NLRB No. 26, slip op. at 9 (2021).

President Needham testified he did not have specific evidence on this area, then shifted from a couple of guys to one guy in particular. Aaron Hamilton testified that he attended a union meeting approximately 1 week before the election. In attendance were Union Representatives Marshall Douglas and Shannon Vickers and employees VanOpDorp, Gripp, and Havill. Hamilton testified that someone working for the Union, whom he did not identify, asked whether the employees were willing to "walk out" on the Employer. Hamilton testified that he was not willing to do so. According to Hamilton, the "Union" said if he left, the "Union" would make sure that he had a certain amount of insurance and get his Class A union card back. (Tr. 648–649.) Hamilton, a Class A card holder before decertification, allegedly was told that the Union promised him 3 months of insurance so he could get the remaining year paid for.

Hamilton's testimony does not support the stated objection of promising him the Class A card or health insurance in return for a "yes" vote. The Union's statement was in response to "walking out," not a promise in exchange for a vote supporting the Union. Factually, the Employer fails to support this objection. The alleged statements do not show coercion. *NLRB v. Erie Brush and Mfg. Corp.*, 406 F.3d 795 (7th Cir. 2005), enfg. 340 NLRB 1388 (2003).

I therefore overrule the Employer's objections.[58]

D. Conclusions Regarding Challenges and Objections

The Employer challenges the ballots of two employees it unlawfully terminated. I sustained the objection to Gripp and overruled the challenge to VanOpDorp's ballot. I sustained the Union's challenges to 7 ballots. In light of the sustained objections, opening VanOpDorp's ballot is insufficient to change the results of the election. I therefore find that the objections are sufficient to warrant a new election. Several factors support this conclusion: the objectionable conduct of packing the unit; threatening and coercing employees in the July 9 meeting; the 8(a)(1) statements; 8(a)(3) termination of a union supporter during the critical period, one of which also violated Section 8(a)(4). *David Saxe*, 370 NLRB No. 103, slip op. at 5.

[58] The Employer claims that the Union's conduct was sufficient to fall into the proscription of Sec. 8(b)(1)(A). However, the Region previously dismissed the Employer's charge against the Union with this allegation. I make no finding on this point.

Protective Order for the Employer's Tax Returns

During the course of the hearing, the Employer provided unredacted tax returns and President Joe Needham's Schedule C "Profit or Loss from a Business." The Employer requested a protective order for these documents. I gave a temporary protective order that allowed the Union to examine these unredacted documents but refrain from sharing beyond the Union. I requested that the parties brief whether the order should become permanent.

The Employer contends that the Union has no lawful use for the tax returns outside of the hearing and surmises that, if left unprotected, the tax returns would be used "for organizing efforts to tell employees of [the Employer] the income and/or expenses the Company had at the time." (R. Br. at 74.) It also requests that the permanent order require tax returns already in possession of General Counsel and the Union be destroyed. (R. Br. at 75.) The Union has no objection to maintaining a protective order for President Needham's taxes, but does not state whether the Employer's taxes should remain in protected status. (U Br. at 72 fn. 74.) General Counsel's brief does not state a position.

The Employer, as the party moving for the protective order, bears the burden of showing good cause. A motion for a protective order must be for good cause shown. *Omnix International Corp. d/b/a Waterbed World*, 289 NLRB 808, 808–809 (1988). Speculative reasons for continuing a protective order are insufficient. *Omnix*, supra. An agency is required to explain reasons for non-disclosure of documents and cannot rely upon an administrative protective order designating a record confidential. *BS&B Safety Systems, LLC*, 370 NLRB No. 90 (2021), citing *General Elec. Co. v. NRC*, 750 F.2d 1394, 1400 (7th Cir. 1984).

First, if a party takes exception to one or more of my rulings herein, an order for the parties to destroy documents is premature. Secondly, the tax returns are part of the hearing record and subject to the Freedom of Information Act. The Employer's reasons for requesting a protective order verbalizes its own fears but otherwise is unsupported. I therefore dissolve the temporary protective order for the Employer's tax records and Schedule C.

CONCLUSIONS OF LAW

1. Needham Excavating, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following are supervisors within the meaning of Section 2(11) and/or agent within the meaning of Section 2(13) of the Act:

Joe Needham	President
Nick Needham	Manager
Curt McKinley	Superintendent
Dan Needham	

4. Bill Wheeler is an agent within the meaning of Section 2(13) of the Act.
5. Casie Morehead is an agent within the meaning of Section 2(13) of the Act.
6. Needham Excavating, Inc. has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) by the following:
    a. Creating the impression that its employees' union and protected concerted activities were under surveillance;
    b. Interrogating employees about their union and protected concerted activities;

c. Threatening employees with discharge and discipline for their union and protected concerted activities;
d. Disparately limiting discussions about the union while permitting discussions any other topic during working and company time; and,
e. Soliciting grievances and promising to remedy them to avoid the employees' union activities.

7. By discharging Adam VanOpDorp because of his support for the Union Respondent/Employer Needham Excavating Inc. violated Section 8(a)(3) and (1).
8. By discharging Adam VanOpDorp because he participated in Board activities, Respondent/Employer Needham violated Section 8(a)(4) and (1).
9. The unfair labor practices found above affect commerce within the meaning of Section (6) and (7) of the Act.

REMEDY

Having found that Respondent/Employer Needham Excavating, Inc. has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that the Employer violated Section 8(a)(3) and (1) by terminating employee Adam VanOpDorp and laying off Brett Gripp, I shall order the Employer to offer them full reinstatement to their former jobs, or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previous enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay for VanOpDorp and Gripp shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, in accordance with *King Soopers, nc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Employer to compensate these individuals for their reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Employer shall compensate them for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and also, within 21 days, a copy of their corresponding W-2 forms in accordance with *Cascades Containerboard Packaging Niagra*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

I recommend that the Employer be ordered to post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010).

The record reflects turnover between the time the Employer began its unlawful conduct, which is documented as early as March 18, 2019. As a result, I recommend that the notice be mailed to all employees, former employees and to all employees employed by K&K and all employees that the Employer claimed were employees but were not under the *Steiny/Daniel* formula. See generally *Jon P. Westrum d/b/a J. Westrum Electric*, 365 NLRB No. 151, slip op.

at 1 fn. 3 (2017), enfd. 753 Fed..Appx. 421 (8th Cir. 2019), cert. denied __ U.S. __, 140 S.Ct. 2771 (2020).

I also order a new election based upon the objections. The new election notice shall include the reasons for setting aside the election. *Snap-On Tools, Inc.*, 342 NLRB 5 fn. 3 (2004), citing *Lufkin Rule Co.,* 147 NLRB 341 (1964) and *Fieldcrest Cannon, Inc.,* 327 NLRB 109, 110 fn. 3 (1998).

ORDER

Respondent Needham Excavating Inc., Walcott, Iowa, its officers, agent, successors, and assigns, (the Employer) shall

1. Cease and desist from
   a. Discharging, laying off or otherwise discriminating against employees because of their support for the Union or because they have otherwise engaged in protected concerted activities.
   b. Discharging or otherwise discriminating against employees because of their activities with the National Labor Relations Board.
   c. Creating the impression that it engaged in surveillance of its employees' union or other protected concerted activities.
   d. Coercively interrogating employees about their own or other employees' union or other protected concerted activities.
   e. Threatening employees with termination or discipline for engaging in union or other protected concerted activities.
   f. Discriminatorily restricting employees from discussing the union while permitting other topics to be discussed.
   g. Soliciting employees grievances or requests for improved terms and conditions of employment in order to discourage them from supporting the Union.
   h. In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.
   a. Within 14 days from the date of this Order, offer Brett Gripp and Adam VanOpDorp full reinstatement to their former jobs or, if those jobs no longer, exist, to substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.
   b. Make Brett Gripp and Adam VanOpDorp whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.
   c. Compensate Brett Gripp, and Adam VanOpDorp for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them.
   d. File with the Regional Director for Region 25 a copy of each affected employee's corresponding W-2 form(s) reflecting his backpay award.
   e. Within 14 days from the date of this Order, remove from its files any references to the unlawful termination of Adam VanOpDorp and the unlawful layoff of Brett

Gripp, and within 3 days thereafter notify them in writing that this has been done and the discharge and layoff will not be used against them in any way.

f. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

g. Post at its Walcott, Iowa facility and the K&K building copies of the attached notice marked "Appendix."[59] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Employer's authorized representative, shall be posted by the Employer and maintained for 60 consecutive days in conspicuous placed including all places where notices to employees are customarily posted. In addition to physical posting of paper notice, the notice shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. If the Employer has gone out of business or closed the facilities involved in these proceedings, the Employer shall duplicate and mail, at its own expense, a copy of the notice and explanation of right to all current employees and former employees employed by then Employer at its Walcott, Iowa facility at any time since March 18, 2019.

h. Mail, at its own expense, to all employees and those persons the Employer claimed to be employees employed since March 18, 2019, a copy of the notice found in Appendix.

i. Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Employer has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that Case 25–RC–243735 is severed from Cases 25–CA–239166, 25–-CA–244670, 25–CA–245763, and 25–CA–261188 and remanded to the Regional Director for Region 25 for action consistent with the Direction below.

[59] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notice may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent/Employer customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DIRECTION

IT IS DIRECTED that the election shall be set aside and a second election shall be conducted at such time as the Regional Director deems appropriate. The second election notice should include the reasons for repeating the election.

Dated Washington, D.C., December 20, 2021

Sharon Levinson Steckler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT lay off, discharge, or otherwise discriminate against you because of your support for the Union or because you have otherwise engaged in protected concerted activities.

WE WILL NOT create the impression that we are engaged in surveillance of you union or other protected concerted activities.

WE WILL NOT threaten you with discharge or other discipline for engaging in union or other protected concerted activities.

WE WILL NOT coercively interrogate you about your own or other employees' union or other protected concerted activities.

WE WILL NOT solicit grievances or requests for improved terms and conditions of employment from you to discharge you from supporting the Union.

WE WILL NOT restrict your discussions about the union while permitting other discussions during working time and/or company time.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Brett Gripp and Adam VanOpDorp full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Brett Gripp and Adam VanOpDorp whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earnings, plus interest, and

WE WILL also make them whole for any reasonable search-for work and interim employment expenses, plus interest.

WE WILL compensate Brett Gripp and Adam VanOpDorp for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them.

WE WILL file with the Regional Director for Region 25 a copy of Brett Gripp's and Adam VanOpDorp's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's order, remove from our files any references to the unlawful discharge of Adam VanOpDorp and the unlawful layoff of Brett Gripp, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful actions will not be used against them in any way.

NEEDHAM EXCAVATING, INC.
(Employer)

DATED: _____ BY_____

(Representative) Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Regional Office 25 - Indianapolis, IN
575 N. Pennsylvania Street
Room 238
Indianapolis, IN 46204-1577
Tel: (317) 226-7381
Fax: (317) 226-5103
8:30am - 5:00pm ET

Subregional Office 33 - Peoria, IL
101 SW Adams Street
Suite 400
Peoria, IL 61602-1335
Tel: (309) 671-7080
Fax: (309) 671-7095

8:00am - 4:30pm CT

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/25–CA–239166 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (317) 226-7381